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Collective Duties (farḍ Kifāya) In Islamic Law: The Moral Community, State Authority And Ethical Speculation In The Premodern Period

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Abstract

This dissertation studies a unique subset of legal obligations in Islamic law known as “collective duties” (farḍ kifāya) and focuses on juristic writing in the premodern period between the 9th and 14th centuries C.E. Together with the more widely recognized “individual obligations” (farḍ ‘ayn), these duties encompass the complete range of mandated behavior in Islamic law. Individual obligations follow a simple pattern: one person is assigned responsibility for performing a particular act and is solely held responsible if they fail to do so. Collective duties are premised on a different concept involving shared responsibility for required acts. They are based on a formula consisting of two clauses, which loosely draws from a Qur’ānic proof-text. The first clause states that as long as some people perform the duty, then the obligation is suspended for everyone else. While everyone initially carries the burden, they are not all required to perform. However, the second clause adds an important warning: if no one performs the duty, then everyone is held accountable.

This study explores the juristic discourse on collective duties in order to better understand how they function, what purpose they serve and why they might have been created. As premodern jurists explored the implications of collective duties as a whole, they developed the theoretical outlines of a kifāya-doctrine, one that asked questions of whether collective duties were preferred to individual obligations, who in the collective was required to perform and when an obligation was suspended. Beyond the general doctrine, the dissertation also examines legal rules developed for three specific collective duties: jihād, funerary rites and duties to rescue. The discourse on these duties demonstrates how jurists not only provided practical guidance for performance of the obligation, but also thought more broadly about the theoretical implications for law. In the process, they began to determine who belongs in the moral community, defined a robust role for the state in law’s implementation and speculated on what should constitute ethical behavior. As a result, they made clear that the normative universe of obligation is essential to understanding the Islamic legal tradition.

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COLLECTIVE DUTIES (*FARḌ KIFĀYA*) IN ISLAMIC LAW:
THE MORAL COMMUNITY, STATE AUTHORITY
AND ETHICAL SPECULATION IN THE PREMODERN PERIOD

Adnan Ahmad Zulfiqar

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AUTHORITY AND ETHICAL SPECULATION IN THE PREMODERN PERIOD
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For my *Dada jaan* and *Nana jaan*,
for all the conversations this life did not afford us.

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teachers, first friends and first champions; they still remain the most important ones. They modelled for me love of knowledge, regard for humanity, the value of hard work and the necessity of humility. They are who I wish I can one day become.

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Mangē bāhjūṇ dē'ēṇ murādāṇ, bē andāz, shumārāṇ
Jō ehsān mērē tē kītē, dam dam shukr guzārāṇ

Mālī dā kam pānī dēnā, bhar, bhar mushkāṇ pāwē
Mālāk dā kam phal phul lawnā, lāwē yā nah lāwē

(Mian Muḥammad Baksh)

ABSTRACT

COLLECTIVE DUTIES (*FARḌ KIFĀYA*) IN ISLAMIC LAW: THE MORAL COMMUNITY, STATE AUTHORITY AND ETHICAL SPECULATION IN THE PREMODERN PERIOD

Adnan A. Zulfiqar

Joseph E. Lowry

This dissertation studies a unique subset of legal obligations in Islamic law known as “collective duties” (*farḍ kifāya*) and focuses on juristic writing in the premodern period between the 9th and 14th centuries C.E. Together with the more widely recognized “individual obligations” (*farḍ ‘ayn*), these duties encompass the complete range of mandated behavior in Islamic law. Individual obligations follow a simple pattern: one person is assigned responsibility for performing a particular act and is solely held responsible if they fail to do so. Collective duties are premised on a different concept involving shared responsibility for required acts. They are based on a formula consisting of two clauses, which loosely draws from a Qur’ānic proof-text. The first clause states that as long as some people perform the duty, then the obligation is suspended for everyone else. While everyone initially carries the burden, they are not all required to perform. However, the second clause adds an important warning: if no one performs the duty, then everyone is held accountable.

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INTRODUCTION

“A world centered upon obligation is not, really cannot be,
an empty or vain world.”¹

Background

Every intellectual exploration has an origin story, a genesis for why this particular path is being travelled. This is no different for academic endeavors including the present study. The explanation need not venture into butterfly effects from moments in the distant past, but can simply answer the question: why this inquiry? Hence, tailored for this project we might ask, where exactly the idea of writing on *farḍ kifāya*, or collective duties, came from? Aside from the confluence of personal research interests—community, warfare, morality, legal theory—in one study, my pursuit of a fuller understanding of obligation, specifically collective ones, arose out of two key observations.

The first observation came from within the field of Islamic studies, where an increasing number of scholars have pushed to expand the traditional boundaries of inquiry in the field and reopen the question of what precisely should be included in the study of Islam. More importantly, as they advocate for subsuming a wider range of topics

¹ Robert Cover, “Obligation: A Jewish Jurisprudence of the Social Order,” *Journal of Law and Religion*, vol. 5, no. 1 (1987): 70.

under the definition of “Islam,” a parallel goal seems to be the desire to diminish law and theology as prime movers in this space. Putting aside any assessment of the substantive value of this expansion, every field of study can benefit from challenges to commonly held assumptions and ossified understandings. At the same time, it is hard to ignore that both the present and past signify an inescapable truth: law is an overriding preoccupation of the believer. Put another way, the core question for every religious adherent is often a simple one: “what is required of me?” These requirements range between restraint and positive acts; they are found in detailed rules, but also expressed in more open-ended principles and maxims. From the answers to this core question a moral community takes shape. Changing geographies and times bring variation to the answers and, in the process, refine the boundaries of the community. Yet, the north star of the moral community remains the same: duties that its members owe and that they are owed.

Juxtaposed to this trend in the field of Islamic studies, my second observation came as a result of the “lived Islam” around me, in the United States and across the globe. Here, I observed a discourse permeated with the language of law and manifesting the believers’ preoccupation described above. Countless books on what was required of the believer occupied the marketplace, only to be dwarfed by the volume of websites devoted

to providing advice and answering inquiries on the topic. What proved most fascinating was the ever-expanding nature of these requirements, a trend that betrayed a common, arguably universal, operating assumption regarding piety: the more requirements to fulfill, the greater one's faith. However, I observed that the creation of more requirements often required less rigor in the application of legal terminology, in particular the term "obligation" (*farḍ*). This casual approach to obligation meant that common conversations tended to use the term obligation lightly with no measure of its significance or the consequences of its application. Wherever there was need to emphasize the importance of an act it was framed in the language of obligation: by classifying an act as required, the underlying behavior instantly gained significance.

Of course, this enterprise of expanding the category of obligations is fraught with theoretical difficulties. It is also an interesting illustration of how legal language functions in both technical and lay spaces, often with confusing results. Just as the word "rights" has become ubiquitous in American parlance, the words "*farḍ*" and "*wājib*," as well as their English equivalents "obligation" and "required," and their derivatives, are pervasive in modern Muslim parlance. A few examples help illustrate the consequences of this expansion and unrestrained usage.

In early 2017, a Jewish cemetery was desecrated in Northeast Philadelphia and there was an overwhelming response of sympathy and solidarity from the Muslim community. One particular tweet stood out to me during this period. A Muslim in the United States Marine Corps wrote on Twitter: "I'm a #MuslimMarine in Chicagoland area. If your synagogue or Jewish cemetery needs someone to stand guard, count me in. Islam *requires* it (emphasis added)."² The sentiment was echoed by several others. While the statement at that particular political moment was powerful and moving, I immediately thought of his use of the word "requires." What did he mean by "requires?" Was he speaking in a more generic sense of some amorphous Islamic principle of justice that encouraged him to stand guard, without holding him accountable if he failed to do so? Or did he mean this was an actual obligation Muslims were mandated to fulfill and they would be responsible if they failed to do so? While the generic sense of encouraging this behavior was plausible given how easily broad principles can be applied to different circumstances, I struggled to find justification for the claim that this was an actual obligation. It seemed evident the term had been used colloquially, but meant to convey the force associated with a technical religious obligation.

² Wais Bashir, "Muslims offer to guard Jewish sites in US," *BBC News* (March 2, 2017), *available at*: <http://www.bbc.com/news/world-us-canada-39142831> (last visited October 14, 2018).

On another occasion many years prior, I engaged a friend in a conversation about my research on *farḍ kifāya*. He noted that he himself was actually engaged in fulfilling a *kifāya*-duty. Intrigued, I asked him which particular *kifāya*-duty he was fulfilling? He explained that he was a prison chaplain in an all-female correctional facility and that this role was a *farḍ kifāya*. The idea captivated me at the time, and since then, for a few reasons. First, there was no legal authority that I could recall in the years of studying the topic which suggested chaplaincy in prisons, whether male or female, was a type of *kifāya*-duty. Certainly not in the premodern Islamic law literature where that type of chaplaincy was entirely absent. Second, it seemed as though my friend, like many others, emphasized the “communal” aspect of the common translation of *kifāya*-duty as a “communal duty” and applied it to his work. The logic was simple: since he considered his job “beneficial to the community” and it involved a clear religious dimension, it must then be a *farḍ kifāya*. Given that premodern jurists also routinely discussed communal benefit as a rationale for *kifāya*-duties, my friend’s logic was not entirely unreasonable. As will later be shown, jurists employed the same reasoning to attach the label of *kifāya* to an expanded list of acts in the post-formative period.

However, there was a third reason that proved to be most instructive. My friend seemed unconcerned with the potential implications of creating a new *kifāya*-duty in his

job. The fundamental idea behind a *kifāya*-duty is that some can perform on behalf of others, but if no one performs then all are sinful. If one accepted my friend's suggestion that he was engaged in a *kifāya*-duty, then at any point where an all-female correctional facility did not have a Muslim chaplain, the community as a whole would be liable. This came to fruition a short time later when he pursued another opportunity and left his position at the prison vacant. In theory, as long as that position remained vacant, my friend, along with the rest of the community, remained liable for failing to fulfill an obligation. In expanding the category of *kifāya*-duties he had also increased the likelihood of the community being more sinful. Interestingly enough, this consequence was also one that premodern jurists seldom paid attention to.

Defining “Duty”

Bearing the above in mind, the idea of duty (or obligation) receives a fair amount of treatment in Islamic thought, including in the fields of philosophy, theology and law, but an exhaustive discussion of all its various aspects is beyond the scope of the current project. For my purposes, the specific focus here will be on the treatment of duty in the Islamic legal discourse and advancing a better sense of how duties are broadly constructed. The most widely used term for duty in the legal literature is *wājib*, although

other terms are also used, such as *farḍ*.³ For the most part, jurists treat these terms interchangeably with the exception of those jurists affiliated with the Ḥanafī school.

The Ḥanafīs distinguish *farḍ* from *wājib* in three ways. First, they say that *farḍ* must come from “unimpeachable sources.”⁴ In other words, all *farḍ* injunctions must be proven on the basis of an epistemologically “certain source that has no form of doubt in it, that is, *dalīl thābit lā shubhata fih*.”⁵ Second, *farḍ* requires “mental affirmation.”⁶ And finally, a “commitment” to *farḍ* is a pre-requisite for membership in the Muslim community.⁷ None of these apply to *wājib*. Hence, intentionally failing to perform a *farḍ*-duty is considered a purposeful omission, making it more blameworthy and deserving of severe consequence, such as being branded a disbeliever (*kāfir*). On the other hand, intentionally failing to perform a *wājib*-duty is simply a neglectful act and not one that rises to the level of disbelief.⁸

³ In addition to *farḍ* and *wājib*, there are words like *kataba*, *amr*, *‘alā* or different constructions that indicate performance is required, such as “imperative expression,” an “infinitive acting as a verb,” or a “verbal noun.” Ahmad Hasan, *Principles of Islamic Jurisprudence: The Command of the Shari‘ah and Juridical Norm* (Islamabad: Islamic Research Institute, 1993), 44-47.

⁴ A. Kevin Reinhart, “Like the Difference Between Heaven and Earth: Ḥanafī and Shāfi‘ī Discussions of *Farḍ* and *Wājib* in Theology and Uṣūl,” in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 216.

⁵ Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (South Bend: University of Notre Dame Press, 2004), 97.

⁶ Reinhart, “*Farḍ* and *Wājib*,” 216.

⁷ Reinhart, “*Farḍ* and *Wājib*,” 216.

⁸ Reinhart, “*Farḍ* and *Wājib*,” 209. For his part, Zarkashī, a Shāfi‘ī, notes that when it comes to *farḍ kifāya* and *wājib* there is no real difference from the perspective of obligation except that *kifāya* allows the

Non-Ḥanafī scholars critically weigh in on this distinction, generally considering the Ḥanafī argument to be semantic and inconsequential. Ibn Ḥazm (d. 456/1064) provides a blunter assessment of the Ḥanafī position referring to it as essentially incomprehensible.⁹ He insists that only two types of acts are possible: noncompulsory (*taṭawwuʿ*) and compulsory (*farḍ*) ones. Noncompulsory acts are not sinful to forgo (*lam yakun ʿaṣiyan li-Allāh*), but their nonperformance is disliked while compulsory acts are sinful to omit.¹⁰ There is no third option: either you are liable for failing to perform an obligation or you are not (*immā shayʾ yaʿṣī Allāh taʿālā tārikuhu wa-immā shayʾ lā yaʿṣī Allāh taʿālā tārikuhu wa-lā wāsiṭah baynahumā*).¹¹ As proof, Ibn Ḥazm cites a Prophetic ḥadīth where he responds to an interlocutor who asks “what is Islam,” to which the Prophet responds that the five prayers are compulsory and everything beyond that is noncompulsory.¹² Had there been a third option, Ibn Ḥazm argues, it would have been

obligation to be removed by the actions of a few while *wājib* does not since it is a burden that every person must carry. Badr al-Dīn al-Zarkashī, *al-Bahr al-muhīṭ fī uṣūl al-fiqh*, vol.1, ed. ʿAbd al-Qādir ʿAbd Allāh al-ʿĀnī (Kuwait: Wizārat al-awqāf wa-l-shuʿūn al-islamiyya, 1992), 243.

⁹ Ibn Ḥazm, *al-Muḥallā*, vol. 2, ed. Aḥmad M. Shākir (Cairo: Idārat al-Ṭabāʿat al-Muniriyyah, 1928), 227. He does not mention the Ḥanafīs by name, but simply says that “some people say” (*qāla qawm*) that there is a third category known as *wājib*. His full response to this position is that “this is a mistake because it is a claim without any proof and a statement that is incomprehensible and even the person making the claim is not able to explain its meaning.” (*hadhā khaṭāʾ li-annahu daʿwā bi-lā burhān wa-qawl lā yufham wa-lā yaqdir qāʾiluhu ʿalā an yubayyin murādahu fīhi*). Ibid.

¹⁰ Ibn Ḥazm, *Muḥallā*, vol. 2, 226.

¹¹ Ibn Ḥazm, *Muḥallā*, vol. 2, 227.

¹² Ibn Ḥazm, *Muḥallā*, vol. 2, 228.

stated in this ḥadīth. Hence, he considers the terms *wājib*, *farḍ*, *ḥatm*, *lāzim* and *maktūb* to be interchangeable, carrying the same meaning: obligatory.¹³ Abū Ishāq al-Shīrāzī (d. 475/1083) echoes this view stating that *maktūb*, *wājib* and *farḍ* all carry the same meaning.¹⁴ He says the terms are synonymous because each mandates punishment for non-performance. Shīrāzī notes that the Ḥanafīs consider *farḍ* to be based on definitive evidence (*bi-dalīl maqtūʿ bihi*) while their definition of *wājib* is based on evidence formulated through interpretation (*bi-dalīl mujtahadin fīhi*).¹⁵ Like others, he also considers this distinction purely semantic with no substantive impact.

Sayf al-Dīn al-Āmidī (d. 631/1233) addresses the distinction between *farḍ* and *wājib* stating that, setting aside their technical meanings, semantically *wājib* means “falling” or “fixed” while *farḍ* means “estimation” (*taqdīr*), “revelation” (*inzāl*) or “permissibility” (*ḥilla*).¹⁶ Āmidī recognizes the semantic differences between the two terms, but from a technical, legal perspective sees no distinction between them. He notes that both terms signal what the Lawgiver considers blameworthy behavior.¹⁷ Āmidī is

¹³ Ibn Ḥazm, *Muḥallā*, vol. 2, 227.

¹⁴ Shīrāzī, *al-Lumaʿ fī uṣūl al-fiqh*, ed. Muhyī al-Dīn Yūsuf Alī Badawī (Damascus: Dār al-Kalām al-Ṭayyib, 1994), 63.

¹⁵ Shīrāzī, *Lumaʿ*, 64.

¹⁶ ʿAlī b. Muḥammad al-Āmidī, *al-Iḥkām fī uṣūl al-Aḥkām*, vol. 1, ed. ʿAbd al-Razzāq ʿAfīfī (Riyadh: Dār al-Ṣamīʿī li al-Nashr wa al-Tawzīʿ, 2003), 135.

¹⁷ Āmidī, *Iḥkām*, vol. 1, 136.

also aware of the Ḥanafī position and summarizes it by stating that for them *farḍ* is backed by “definitive” (*maqṭū‘an*) evidence while *wājib* is based on “speculative” (*maznūnan*) evidence. He also contends that this distinction is just semantic and does not impact whether something is obligated. In fact, he argues that the Qur’ān itself uses *farḍ* and *wājib* interchangeably.¹⁸

Despite being the most commonly used term for obligation, *wājib* is employed in such a variety of ways that its definitions are “often intermingled, sometimes confused, and overlapping and only identifiable once the source, and the inherent spirit of legislation is referenced.”¹⁹ If we consider Āmidī’s discussion on obligation again we find that it is illustrative of the general framework within which jurists consider obligations. From an etymological perspective, Āmidī notes that the word for “obligation” (*wajaba*) is meant to convey the idea of “falling down” (*suqūṭ*). For example, he mentions that the “the sun setting” is described as *wajabat al-shams*. Similarly, if a wall collapses it is described as *wajaba al-ḥā’iṭ*. Āmidī also connects the meaning of obligation to the words “firmness” (*thubūt*) and “resoluteness” (*istiqrār*), citing a Prophetic ḥadīth as evidence:

¹⁸ Āmidī, *Iḥkām*, vol. 1, 136-137.

¹⁹ Izzi Dien, *Islamic Law*, 97.

“If a sick person dies, then no females should weep for him” (*idhā wajaba al-marīḍ fa-la tabkīn bākiyatan*).²⁰

With regard to technical or legal (*sharīʿa*) usage of the term, Āmidī states that duties are those acts, which, if omitted, trigger a penalty.²¹ This is the most widely accepted definition of duty or obligation. In Āmidī’s opinion, the “rendering obligatory” (*wujūb*),²² in terms of the *Sharīʿa*, is how God’s (*al-shāriʿ* or “Lawgiver”) persuasive “speech” (*khiṭāb*) designates the nonperformance of particular acts as blameworthy in certain situations (*fī hālatin mā*).²³ As Bernard Weiss explains, Āmidī considers any “addressed speech that constitutes a *Sharīʿa* categorization” as either calling for something or not calling for anything. If it calls for something, then it is either calling for performance or nonperformance of an act. If it calls for performance, then it does so either in a “peremptory manner” or “nonperemptory manner.” If it does so in a

²⁰ Āmidī, *Iḥkām*, vol. 1, 133.

²¹ Āmidī, *Iḥkām*, vol. 1, 134.

²² In this specific instance, I’ve adopted Bernard Weiss’ definition of *wujūb* here based on his reasoning for how Āmidī uses the term. Bernard Weiss, *The Search for God’s Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 2010), 94 & 96. In other places I maintain a simpler translation of “obligation” or “duty” as these translations lack the awkwardness of placing “rendering obligatory” in a sentence.

²³ Āmidī, *Iḥkām*, vol. 1, 134.

peremptory manner then “the categorization constitutes a *rendering obligatory*,” if it is nonperemptory then “it constitutes a *recommending*.”²⁴

Obligation in Theology

Before delving further into the legal dimensions of obligation, a brief comment on how theologians discussed duty might be helpful. The central question for theologians concerning duty is *why* God should be obeyed. Aron Zysow notes that historically theologians had two primary answers to this question: “prudence” and “morality.”²⁵ The Ash‘arī school advocated for “prudence,” believing that no “moral order exists independent of revelation” thus the act of obeying God is prudential. God’s command activates duties and these duties are rooted in the “threat of punishment.”²⁶ Thus, the Ash‘arī position, which became normative for a certain current of Shāfi‘īs and some other jurists, was one where “an obligatory act is nothing more or less than an act that God makes obligatory by his decree whether there be a reason behind it or not.”²⁷

²⁴ Weiss, *God’s law*, 95.

²⁵ Aron Zysow, “Two Theories of the Obligation to Obey God’s Commands,” in *The Law Applied: Contextualizing Islamic Shari‘a*, eds. Peri Bearman, Wolhart Heinrichs and Bernard Weiss (New York: I.B. Tauris, 2008): 397.

²⁶ Zysow, “Two Theories,” 397.

²⁷ Weiss, *God’s Law*, 88.

On the other hand, the Muʿtazilīs were proponents of “morality” as the reason to obey God. For them, there is a moral order that exists separate from revelation and obligations are necessarily grounded in reasons outside of revelation.²⁸ As a result, they saw two different approaches to the question of obeying God. The first is what Zysow terms the “Baghdadi” theory of “gratitude to the benefactor.” This approach, whose main proponents included Abū l-Qāsim al-Kaʿbī (d. 319/931), the Twelver Shiʿī, Zaydīs, some Shāfiʿī and Central Asian Ḥanafīs, believed that human obedience to God’s law did not merit a divine reward since fulfillment of the duty was actually a way to demonstrate gratitude to God.²⁹ Other scholars like Ibn Mattawayh (d. 469/1076) rejected this idea, noting that there were certain duties, like *jihād* and fasting, which were too burdensome to be sustained over time simply out of a motivation to show gratitude for God’s benefits to humanity.³⁰

The second theory, which falls under the “morality” answer is what Zysow terms the Basran *luṭf* theory. This theory said that obedience to law is strengthened by the motivation to do what is right and any subsequent reward is merited because of the

²⁸ Zysow, “Two Theories,” 398; see also, Weiss, *God’s Law*, 87.

²⁹ Zysow, “Two Theories,” 398.

³⁰ Zysow, “Two Theories,” 401. The theory of gratitude was revived in Yemen by the Zaydis. It gives a more universalist notion of revealed law in that it makes revealed law necessarily contemporaneous with morality and binding on all humans. Zysow, “Two Theories,” 410.

“hardship” in complying with the command despite other impulses.³¹ Basran Mu‘tazilīs argued that since God is obligated to act for the “maximal benefit” of His creatures, they owe Him no gratitude because the obligation to be grateful only arises when the benefactor acts without being under an obligation.³² According to Zysow, the general trend was for Mu‘tazilīs, Twelvers and Zaydīs to move from the gratitude theory to *lutf*.³³

A Framework for Legal Duties

Returning to the legal perspective on duty, the term *farḍ* is discussed in a variety of ways with slight differences in how certain associated terminology is used. One useful way of structuring the discussion on legal duties is found in the writings of the modern Syrian jurist Wahbah al-Zuhaylī (1932-2015). He creates four categories to help explain obligations. Each category is distinct and provides four different paradigms within which Islamic legal duties can be understood: (1) obligations based on *when* the act must be

³¹ Zysow, “Two Theories,” 399. As Mairaj Syed explains, the “source of the hardship...is the value forgone, as represented by the motivations ignored in the choice that is made.” Mairaj Syed, *Coercion and Responsibility in Islam: A Study in Ethics and Law* (Oxford: Oxford University Press, 2017), 52.

³² Zysow, “Two Theories,” 401.

³³ Zysow, “Two Theories,” 402. There were also different theories with regard to duties that exist as a result of revealed law, for instance prayer. Some argued that there was no independent reason for these duties outside of revelation. Others said that there were reasons for these acts outside of revelation because they conferred benefits on human beings. Māturīdī said that God’s bounty touches every organ and every organ must express gratitude. Since reason cannot determine the measure of gratitude due for each organ, prophecy is necessary. *Ibid.*, 405.

performed, (2) *who* is obligated to perform it, (3) the extent of performance required and (4) whether an *option* to perform exists or not.

The first category, concerning when performance must take place, is divided into two parts: open-ended (*al-wājib al-muṭlaq*) and time-bound (*al-wājib al-muqayyad*). An open-ended duty does not specify any particular time period within which performance must take place; it can be performed immediately or delayed till later.³⁴ On the other hand, the time-bound duty requires performance to occur, barring a legitimate excuse, within a particular time period otherwise it is no longer valid.³⁵ The most common example of this is the designated times within which five obligatory prayers must be performed.³⁶ Some scholars, particularly in the Ḥanafī school, divide the time-bound duties into three subdivisions. One subdivision is *muwassaʿ* (broad) and includes those acts where more than enough time has been allocated for the duty to be performed. Although the obligation is restricted to a particular time period, that time period itself is broad and more than adequate for performance to take place.³⁷ For instance, an example would be one of the daily prayers: the prayer might take five minutes to perform, but the

³⁴ Wahba al-Zuhaylī, *Uṣūl al-fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1986), 50.

³⁵ Zuhaylī, *Uṣūl*, 50.

³⁶ Zuhaylī, *Uṣūl*, 50.

³⁷ Zuhaylī, *Uṣūl*, 49.

time period within which performance must occur is significantly greater than that.³⁸

Another subdivision is *muḍayyaq* (narrow), where the time granted for performance is sufficient for one act to be performed and no similar act. For instance, the Ramadan fasts must be performed within a specific month and no other types of fasts can be performed during this month.³⁹ The final subdivision is *dhū shibhayn* (possessing both qualities), which refers to acts that include elements of both *muwassaʿ* and *muḍayyaq*: some aspects of the duty can be performed within a broad time frame, but other aspects are more restricted.⁴⁰ Hajj would fall under this subdivision: it must be performed once in a person's lifetime (*muwassaʿ*), but can only be performed on certain days in any given year (*muḍayyaq*).⁴¹

The second category of duty is based on guidelines for the extent and amount of performance required. There are two types within this category. The first is *al-wājib al-muḥaddad* (fixed obligatory act) where both the extent and amount of performance are defined and satisfying the duty means meeting those exact requirements. Examples would be the number of prayers performed in a day and how many prostrations they

³⁸ Zuḥaylī, *Uṣūl*, 49.

³⁹ Zuḥaylī, *Uṣūl*, 49.

⁴⁰ Zuḥaylī, *Uṣūl*, 49.

⁴¹ Zuḥaylī, *Uṣūl*, 49.

involve or the amount of zakat that must be paid by each particular individual. This type of duty automatically incurs “liability” for nonperformance.⁴² The second type is *al-wājib ghayr muḥaddad* (variable obligatory act) where neither the extent nor the amount of performance has been defined and liability only attaches based on judicial decree or initiation of performance. In other words, these are broad duties requiring acts that can be performed in a number of ways; examples are spending in the way of God (such as, to build a mosque), cooperating in good works, feeding the hungry, etc. These duties do not have fixed requirements because they are contingent on needs and circumstances.⁴³

The third category is based on *who* must perform and is most pertinent to our discussion here. This category is divided into “duties every individual is required to perform” (*al-wājib al-‘aynī*) and those “only required of some community members” (*al-*

⁴² Zuḥaylī, *Uṣūl*, 59. The use of the term “liability” requires additional explanation. It is an imperfect expression in the context of Islamic legal duties and even in Western law can carry multiple meanings depending on which field of law is being discussed. In general, in modern legal settings, “liability” for failing to perform a duty implies there will be some penalty forthcoming from the legal system that has jurisdiction over you, whether in the form of non-penal sanction (civil liability) or incarceration (criminal liability). Unperformed religious obligations, on the other hand, are generally viewed as only incurring “moral blame.” The challenge for Islamic legal duties is that they exist between these two categories. There is moral blame for failing to perform obligations. At the same time, you will be held accountable for nonperformance, meaning it might lead to punishment if, on balance, your praiseworthy acts are not greater than the blameworthy ones. But this punishment tends to be deferred till the afterlife. Unfortunately, no adequate term exists to describe this position that includes both liability and blame. On balance, using the word “liability” signals the importance of recognizing there is an undefined penalty associated with nonperformance of Islamic legal duties, which is why I have chosen to use it throughout this text.

⁴³ Zuḥaylī, *Uṣūl*, 59.

wājib al-kifāʾi).⁴⁴ Individual duties, required of every person with legal capacity, cannot be satisfied through third-party performance. On the other hand, with collective duties there is no concern over who performs, only that performance should result in the duty being fulfilled. If performance is completed, then the duty is suspended for everyone else.⁴⁵ In Zuḥaylī's framework, focusing on the person bearing legal responsibility for the duty is just one way of approaching the category of collective duties, but for many medieval scholars this was the *only* frame of reference for understanding duties.

For instance, Abū Bakr al-Bāqillānī (d. 403/1013) frames his understanding of *farḍ* on three types of performers, though an individual can be more than one type. Each type encompasses a different aspect of *farḍ* and collectively they represent every aspect of what is obligatory.⁴⁶ The first performers are individuals who have reached the age of maturity. The obligations they owe revolve around belief: belief in God, the Prophet, prior revealed texts, as well as devotional acts (*ʿibādāt*) required of every person, such as prayer and fasting.⁴⁷ The second category are duties strictly for the scholarly class, not

⁴⁴ Zuḥaylī, *Uṣūl*, 60.

⁴⁵ Zuḥaylī, *Uṣūl*, 62. This is the standard formulation found in medieval scholarship as well. Ibn Ḥazm, *Muḥallā*, vol. 2, 143.

⁴⁶ Abū Bakr b. al-Ṭayyib al-Bāqillānī, *Al-Inṣāf fīmā yajibu iʿtiqāduh wa-lā yajūz al-jahl bihi fī ʿilm al-kalām*, ed. Muḥammad Zāhid al-Kawtharī (Cairo: al-Maktabat al-Azhariyya li-l-Turāth, 2000), 21. For a more detailed look at Bāqillānī's hermeneutics, see generally, David Vishanoff, *The Formation of Islamic Legal Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (New Haven: American Oriental Society, 2011).

⁴⁷ Bāqillānī, *Inṣāf*, 20-21.

the general public. For instance, these duties include issuing legal opinions regarding religious rules (*aḥkām al-dīn*), exercising independent legal reasoning (*ijtihād*), examining the methods of arriving at legal rules (*ṭuruq al-aḥkām*), knowing what is licit (*ḥalāl*) and illicit (*ḥarām*). The duties in this category are considered *farḍ kifāya* and are not designated for any one particular person to perform. As long as some people, specifically scholars, perform the duty then the rest of the community (*ummah*) is no longer liable.⁴⁸ Bāqillānī considers these duties to include memorizing the Qurʾān, relating parts of the Prophetic *sunnah*, performing funeral rites or undertaking *jihād*.⁴⁹ Interestingly enough, he is one of the few jurists who assigns legal responsibility for these duties to the “community of scholars” as opposed to the whole community. The final category of obligations is one Bāqillānī considers the ruler’s responsibility separate from the rest of the community. Within this category he includes carrying out the *ḥudūd*, appointing deputies and justices, and adjudicating.⁵⁰

⁴⁸ Bāqillānī, *Inṣāf*, 21. Interestingly, Bāqillānī’s use of the term *ummah* is quite unique since it is rarely used by other jurists for this formulation. Jurists generally state that the duty will be suspended for “the rest” and assume the reader understands *who* exactly the rest are. It should be noted though, that in using the term *ummah*, Bāqillānī likely just means a community in a particular area as opposed to the entire Muslim community.

⁴⁹ Bāqillānī, *Inṣāf*, 21.

⁵⁰ Bāqillānī, *Inṣāf*, 21. The category of duties specific to the ruler is also raised by Nawawī in relation to the collective duty to “command what is right and forbid what is wrong.” He says that this duty is assigned to specific people through the state’s authority (*ḥukm al-wilāya*) and they are known as the *muḥtasib*. Yahyā b. Sharaf al-Nawawī, *Rawḍa al-Ṭālibīn*, vol. 7, eds. ‘Ādil Aḥmad ‘Abd al-Mawjūd and ‘Alī Muḥammad

Returning to Zuḥaylī, his final category of duties relies on determining the purpose of the act (*ta'yīn al-maṭlūb bihi*) and is divided into two sub-categories. One sub-category is a designated obligatory act (*al-wājib al-mu'ayyan*), where the Lawgiver has assigned someone to fulfill the duty, and thus nonperformance is not an option.⁵¹ This sub-category includes acts like prayer and fasting, and anyone that possesses legal capacity is required to perform. The second category is an obligatory act that contains the option to perform (*al-wājib al-mukhayyar*).⁵² The Lawgiver provides several options for how the duty can be fulfilled. The classic example of this is expiation (*kaffārah*) for breaking an oath. The requirement to expiate can be fulfilled through choosing one of three options: feeding ten indigent persons, clothing ten indigent persons or freeing a slave.⁵³

The Idea of Farḍ Kifāya

With the above in mind, despite a central place for obligation in the Islamic legal discourse, there is surprisingly little written on *farḍ kifāya* in Western academia and, to

Mu'awwaḍ (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), 418-419. *Jihād* is the most common collective duty to fall under the state's administration. I discuss this in more detail in the chapter on *jihād*.

⁵¹ Zuḥaylī, *Uṣūl*, 65.

⁵² Zuḥaylī, *Uṣūl*, 65.

⁵³ Zuḥaylī, *Uṣūl*, 65.

my knowledge, no comprehensive treatment of the subject to date. In addition, no entry for *farḍ kifāya* exists in any edition of the *Encyclopedia of Islam*, though it is mentioned in a brief entry on “farḍ.”⁵⁴ A slightly longer entry on *farḍ kifāya* by Kevin Reinhart appears in the *Oxford Encyclopedia of the Islamic World*, but it also provides a cursory overview.⁵⁵ Of course, the topic does arise in scholarship on specific topics of substantive law that are considered *kifāya* duties, such as *jihād*, foundlings, funeral rites, etc. However, for the most part, these tend to be passing references with no detailed exploration of the idea.

The term *farḍ kifāya* literally translates to a “sufficiency obligation,” meaning it is an obligation that requires a sufficient number of performers in order to be fulfilled. However, the term is generally translated as either “collective” or “communal” duty (or obligation). My own preference is for the term *kifāya*-duty, but I have used this interchangeably with collective duty throughout the text. The idea behind *farḍ kifāya* is a unique one that finds no easy parallel in any other legal tradition. Simply stated, the concept is that although everyone carries the obligation, not everyone needs to fulfill it. In other words, an individual can receive credit for fulfilling an obligation even when he performs no act. Jurists express this in an oft-repeated formulaic phrase consisting of

⁵⁴ Th. W. Juynboll, “Farḍ,” EI2.

⁵⁵ A. Kevin Reinhart, “Farḍ al-Kifāyah,” *Oxford Encyclopedia of the Islamic World*, ed. John L. Esposito (Oxford: Oxford University Press, 2009).

two clauses. The first clause states that: “if some perform [the duty] then it is suspended for the rest” (*idhā qāma bihi al-ba‘d saqaṭa ‘an al-bāqiyīn*).⁵⁶ The second clause is a correlating statement that is less formulaic, but expresses the basic idea expressed in it is that “if no one performs, then everyone is sinful.”⁵⁷ Hence, if a sufficient number of people fulfill these duties then everyone else is exempt, but if no one fulfills them then everyone is liable.

In the following chapters, my objective is to construct a framework for the inquiry that jurists make into the subject of *kifāya*-duties and to examine three of the most prominent ones. The first chapter begins by trying to outline the nature of the general *kifāya* doctrine, essentially the overarching theory that can be gleaned from juristic discussions on the topic. This chapter relies more heavily on the texts of legal theory as opposed to substantive law. Having constructed an overall framework, Chapter Two explores the most prominent *kifāya*-duty: *jihād*. The chapter explores how *jihād*

⁵⁶ Shams al-Dīn al-Sarakhsī, *Kitāb al-Mabsūṭ*, vol. 30 (Beirut: Dār al-Ma‘rifah, 1993), 263. There are different variations of this formula. For instance, Qudūrī crafts it as “if a group from the people performs [the duty] then it drops from the rest” (*idhā qāma bihi farīq min al-nās saqaṭa ‘an al-bāqiyīn*). Abū al-Ḥusayn al-Qudūrī, *Mukhtaṣar al-Qudūrī fī al-fiqh al-Ḥanafī*, ed. Kāmil Muḥammad Muḥammad ‘Uwayḍah (Beirut: Dār al-kutub al-‘ilmiyya, 1997), 231. Shīrāzī states it as “if someone possessing the requisite capability performs [the duty] then it drops from the rest” (*idhā qāma bihi man yaqa‘u bihi al-kifāyah saqaṭa ‘an al-bāqiyīn*). Shīrāzī, *Luma’*, 63.

⁵⁷ For example, Qudūrī phrases it as “if no one performs [the duty] then everyone is sinful for omitting [performance]” (*in lam yaqum bihi aḥadun athima jamī‘ al-nās bi-tarkihī*). Qudūrī, *Mukhtaṣar*, 231.

functions as a *kifāya*-duty, how factors like immediacy and proximity impact the nature of the duty and the crucial role played by the state in administering the duty. Chapter Three shifts focus to duties owed to the dead and contributes to the discussion on navigating between functional and pietistic objectives within the duties. Chapter Four, the last substantive chapter, argues for the creation of a subcategory of duties within the larger *kifāya* category: duties to rescue. It begins by exploring the quintessential duty to rescue, saving someone from drowning, and advocates including the duty to care for foundlings as an extension of this rescue-duty. In the process, the chapter explores the shaping of the moral community and how its contours are defined by the ethical speculation of the jurists.

CHAPTER ONE: THE *KIFĀYA* DOCTRINE

Introduction

As noted in the introduction, jurists speak of “*kifāya*” in the context of *farḍ* (and *wājib*), but also *sunna*, though with markedly less frequency. For our purposes here, *farḍ* is of primary concern because the significance of the category arises from the fact that we are dealing with acts which *must* be performed. Jurists created a category of acts that Muslims should carry out, then elevated their status by making performance of the acts obligatory. Not only did they expand the scope of the law, but made it into a shared enterprise for the community. The process raises several questions, which often emerge in the subsequent discussion: what compelled jurists to create these additional burdens, why the focus on community and what was the urgency? Among the answers is that the *kifāya* project was a space for jurists to engage in moral speculation, where the law was the language of morality for them. Through this speculation, *kifāya* becomes a way for them to shape the moral and ethical contours of the community.

The idea of a “moral” or “ethical” community has been discussed by a number of contemporary thinkers. A helpful framework for appreciating the idea of moral community might be the one proposed by the American legal philosopher Ronald Dworkin (1931-2013). His work contains an overarching theme opposing positivist claims

that law and morality are distinct, something that resonates with premodern Islamic jurisprudence. In discussing this distinction, Dworkin provides insights on the role of community as a “distinct moral agent” necessary for the defense of a key political virtue: integrity.⁵⁸ Integrity is the idea that obedience to the law is not simply about “fidelity to rules,” but also to the “theories of fairness and justice” underlying those rules.⁵⁹ Integrity requires members of the community to “accept demands” on them and allows them to “make demands on others” as part of a “common scheme of justice” or “standards” that they are committed to as a consequence of their communal relationships.⁶⁰ Dworkin terms these demands “associative” or “communal” obligations.⁶¹

⁵⁸ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 188. He notes that this “integrity” is needed because we do not live in a “utopian state” where “coherence would be guaranteed” since “officials would always do what was perfectly just and fair.” Ibid. 176.

⁵⁹ Dworkin, *Law's Empire*, 176 and 185. In other words, the idea of integrity rests on the notion that the “community must respect principles necessary to justify one part of the law in other parts as well.” Ibid., 210.

⁶⁰ Dworkin, *Law's Empire*, 189. The demands do not need to be equal to each other, some may be obligated more than others, but there should be “roughly the same concern” between members of the community. Ibid., 199. This resonates with the unequal distribution of obligations within the *kifāya* framework since expertise, legal capacity, proximity and a number of other factors influence where the obligation lies.

⁶¹ Dworkin, *Law's Empire*, 195-96. He distinguishes these communal/associative obligations from personal obligations, somewhat similar to the *ʿayn/kifāya* distinction, except that Dworkin's personal obligations have no connection to duties owed to God, but rather obligations incurred “through discrete promises and other deliberate acts.” Ibid., 196.

With that in mind, Dworkin outlines the “conditions” he considers necessary for a community to have these obligations, what he calls a “true community.”⁶² There are four conditions that he outlines. First, members of the community must regard “group obligations as *special*,” meaning they are held “distinctly within the group” as opposed to general duties owed to people outside of it.⁶³ Second, they have to accept that the “responsibilities are personal” running “directly from each member to each other member, not just to the group as a whole in some collective sense.”⁶⁴ Third, members have to see the “responsibilities as flowing from a more general responsibility each has of concern for the well-being of others in the group.”⁶⁵ Finally, even if the community is hierarchical, its members must show “equal concern” for everyone within the community: “no one’s life is more important than anyone else’s.”⁶⁶ Dworkin considers this to be a “community of principle,” one in which members “accept their fates are linked” because they accept that “they are governed by common principles, not just by

⁶² Dworkin, *Law’s Empire*, 201. He distinguishes between a “bare community” and a “true community.” The bare community “meets the genetic or geographic or other historical conditions” for a fraternal community; the true community usually has some “bare” quality as well, but requires additional elements (described in the text) to be considered “true.” Ibid.

⁶³ Dworkin, *Law’s Empire*, 199.

⁶⁴ Dworkin, *Law’s Empire*, 199.

⁶⁵ Dworkin, *Law’s Empire*, 200.

⁶⁶ Dworkin, *Law’s Empire*, 200.

rules hammered out” for them.⁶⁷ They also accept that “others have rights” and they themselves “have duties” even if they are never “identified or declared.”⁶⁸ This community of principle is “faithful” to the promise that the law will be “chosen, changed, developed and interpreted in an overall principled way” such that they can then claim the “authority of a genuine associative community and can therefore claim moral legitimacy.”⁶⁹

Premodern Islamic jurists would find that elements of Dworkin’s framework resonate with their own thinking about community and its obligations, but there would also be much that they disagreed with. The basic premise that law and morality are not distinct is evident in premodern writings: Islamic jurists would also balk at the positivist claim that the two ideas should be distinct. One major criticism of Dworkin’s framework that premodern jurists would have is the absence of a role for independent actors outside the state apparatus. Social practice, not jurists, articulate communal obligations in Dworkin’s community of principle as opposed to the outsized role that jurists play in defining these obligations in Islamic law. In his works, Dworkin disfavours what he terms a “rulebook” model of community that has a “general commitment to obey rules” that

⁶⁷ Dworkin, *Law’s Empire*, 211.

⁶⁸ Dworkin, *Law’s Empire*, 211.

⁶⁹ Dworkin, *Law’s Empire*, 214.

are established in a way that is “special” to the community.⁷⁰ In many respects, this is precisely what the premodern jurists’ community was like, though with important elements of a community of principle present as well. Similar to the rulebook community, the premodern community had its own special way of formulating rules that must be obeyed by community members. However, like a community of principle, the structure was highly decentralized and informal, residing outside the state apparatus, and relying on shared values to gain moral legitimacy.

Returning to Dworkin’s conditions for a true community with moral legitimacy, there are points of convergence and divergence with the views of premodern jurists. The first condition, that communal obligations must be special to the community, generally tracks the position of jurists. The requirement to perform *kifāya*-duties does not extend to non-Muslims; in the context of “easy rescues,” however, they are still owed a duty. For easy rescues, no inquiry is made into the religion of a drowning individual prior to saving them. In this instance, jurists extend the moral community to include all of humanity. The second condition, that the obligations are “personal,” running from member to member as opposed to the group as a collective, seems to strike at the core of how *kifāya*-duties function. Unlike Dworkin’s communal obligations, *kifāya*-duties are premised on

⁷⁰ Dworkin, *Law’s Empire*, 210.

the idea that some of the group can fulfill an obligation on behalf of everyone else. Hence, the duty does run from individuals to the group as a collective. The third condition also raises some complications because it connects the obligation to a concern for the well-being of other community members.⁷¹ While the well-being of the community is arguably one reason for the obligations, it is not always the only reason nor a reason that is present in every *kifāya*-duty. The purpose of *kifāya*-duties extends beyond its benefits to any one member within the community. Finally, the fourth condition, equal concern for every member, generally holds true in the *kifāya* context. There are some adjustments in the performance of a duty to account for important communal values like modesty or heroism, but *kifāya*-duties operate on the assumption that each life within the group is equal to another.

Despite the *kifāya* context diverging in some significant ways from Dworkin's framework, the ideas he raises on community and obligation are useful for situating premodern jurists as they navigate the boundaries of moral community and speculate on the law. The subsequent discussion examines the theory that jurists develop around the *kifāya* category, including ideas around community and morality. Their theoretical

⁷¹ This makes sense for Dworkin's model where communal obligations are not fully articulated or defined. As will be discussed, *kifāya*-duties may sometimes extend to undefined areas on the basis of some shared principle, but in general these duties are fully articulated.

discussions reveal what is at stake for them, where their primary concerns lie and what values they consider essential.

Development of the Doctrine

One of the earliest mentions of the “*kifāya* doctrine” in the legal literature occurs in Shāfi‘ī’s seminal works, *al-Risāla* and *al-Umm*. However, the manner in which he discusses *kifāya* suggests that the concept was not his original contribution and was already in circulation.⁷² Aside from providing the standard definition for *kifāya*, Shāfi‘ī does not elaborate on the broader concept and no subsequent writer attributes the concept to Shāfi‘ī either. In general, there is an absence of discussion on *kifāya*’s background in the legal literature. While brevity is not an uncommon feature in writing of this period, one might have anticipated a few more details on *kifāya* and its origins,

⁷² Michael Bonner suggests that Shāfi‘ī may have been the first to “set out the theory of *farḍ kifāya*, but as I note, it is difficult to classify Shāfi‘ī’s discussion on *kifāya* as that of a “theory” or “doctrine” given the absence of an extended discussion on the topic in his works. Michael Bonner, “Ja‘ā’il and Holy War in Early Islam,” *Der Islam* 68 (1991), 46. The general idea behind *kifāya*, the collective fulfillment of a duty, is mentioned in other early texts as well. For instance, ‘Abd al-Razzāq’s (d. 211/826) ḥadīth collection, *al-Muṣannaf*, begins its chapter on *jihād* with two ḥadīth where an interlocutor is asking whether “everyone is required to participate in battle” (*a-wājibun al-ghazw ‘alā al-nās kullihim*). In the first ḥadīth, Ibn Jurayj poses the question to ‘Aṭā’ and in the second someone poses the question to Ibn Jurayj. The term *kifāya* is not mentioned in either ḥadīth, but the premise behind this category of questions is present in the question posed. ‘Abd al-Razzāq al-Ṣan‘ānī, *al-Muṣannaf*, vol. 5, ed. Muḥammad Ḥabīb al-Raḥmān (Beirut: al-Maktab al-Islamī, 1972), 172.

equivalent to what is found when other “new” concepts are introduced. Similarly, the Qur’ān itself does not discuss the *kifāya* concept in any significant detail. It simply presents a basic formula for *kifāya* when discussing the *jihād* duty: not everyone is required to participate in *jihād*, but everyone is eligible for a reward, however those who fulfill the duty are entitled to more. For his part, Shāfi‘ī feels comfortable simply explaining the concept of *kifāya* with reference to these verses without needing to elaborate or theorize much about it.

A fuller articulation of a “*kifāya* doctrine” actually emerges well after the 9th century. By the *kifāya* doctrine, what I mean is both the substantive law and legal theory connected to the performance of particular obligatory acts or duties whose responsibility is shared by the community. Discussions relating to collective duties occur in the legal literature in two principal places: manuals of applied law (*furū‘*) and treatises on legal theory (*uṣūl al-fiqh*). Generally, the *kifāya* doctrine appears in manuals of applied law as part of a jurist’s exploration of matters concerning a specific collective duty. This is the primary location where jurists discuss *kifāya*-duties. In the centuries following Shāfi‘ī, jurists crafted legal guidance for a variety of hypothetical scenarios that might arise in the performance of these duties. In the process, they also significantly expanded the number of acts classified as *kifāya*. While most jurists only discuss how the *kifāya*

doctrine operates as part of specific legal obligations, there are a few that theorize about the broader implications of these collective duties and outline an overarching doctrine. Unlike manuals of applied law, in which one can anticipate finding discussions on *kifāya* as part of the sections on *jihād* or funeral rites, there is little consistency in how *kifāya* is discussed in treatises on legal theory. When the *kifāya* doctrine is mentioned, it appears as part of broader topics like the nature of commands (*amr*), the typology of knowledge (*ilm*) and the meaning of obligation (*wājib*). That said, arguably, the richest discussion of *kifāya* as a doctrine takes place in texts devoted to examining legal theory.

As with other Islamic legal concepts, the robustness of the *kifāya* doctrine in later centuries tracks the introduction of greater complexity in post-formative legal scholarship that endeavored to explain prior legal ideas and take legal doctrine in new directions.⁷³ The earliest discussions of *kifāya* were limited to the specific context of certain duties (performing funeral rites, pursuing religious knowledge and partaking in *jihād*) and contained a basic formulation of what *kifāya* meant in those contexts. The discussion was rudimentary enough that it is difficult to posit that a “doctrine” existed at this stage. After the formative period, many new acts were introduced into the

⁷³ Wael Hallaq, *Shari‘a: Theory, Practice, Transformations* (New York: Cambridge University Press, 2009) 75-78.

category of collective duties even ones that bore no apparent relation to the prior ones. With the creation of more obligatory acts, jurists began to flesh out the doctrine. They employed a positivist approach, working backwards from the obligatory act to articulate rationales for why certain acts should be considered collective duties. However, this rationalization had two primary shortcomings. First, developing rationale in a piecemeal fashion for each duty meant an overarching rationale for the category of collective duties was missing; in other words, there is no unifying explanation for why these acts are grouped together. Second, as a result of the above, there are no consistent guidelines by which other similar acts might also be considered collective duties. Hence, although jurists might cite certain principles that justify why a particular act should be considered a collective duty, it did not mean that any other act which might fall within the scope of that principle could then also be classified as a collective duty. Hence, there is no obvious mechanism for distinguishing between what is included and what is excluded from the *kifāya* category.

Of course, one might speculate that based on the inclusion of certain behavior in the category of collective duties—such as, being socially responsible, redistributing wealth, physically defending one’s community and performing certain collective rituals—the tie that binds these obligations together was building a better moral

community. In part, this may have been the result of an expanding civilization seeking to incorporate new populations into the existing social structure. As Ahmed El Shamsy notes, several changes accompanied the rapid spread of Islam:

“the influx and rising prominence of new converts from diverse backgrounds, the emergence of new alliances and localized Muslim subcultures across the empire, and the consequent dissolution of the tribal ties and ethnic homogeneity that had sustained the initial wave of expansion.”⁷⁴

El Shamsy argues that these changes “prompted a search for new foundations of religious authority, a way of accessing the authentic message of divine revelation that was more secure than the avenue of communal practice.”⁷⁵ He suggests that canonization of the law was introduced to address the “arbitrariness” of a legal system based on communal practice. At the same time, the discourse on collective duties might actually be seen as paying homage to this prior, less formal legal system centered around communal practice and an acknowledgement of the role that community must continue to play within the system despite the “radical individualism” Shāfi‘ī’s theory introduced.⁷⁶ In some respects, communal practice itself was not simply law in action, but law as an expression of the community’s values: the shared morality that bound them

⁷⁴ El Shamsy, *Canonization*, 5.

⁷⁵ El Shamsy, *Canonization*, 5.

⁷⁶ El Shamsy, *Canonization*, 6.

together. The *kifāya* doctrine might then be thought of as the location where jurists continue their speculation about the moral community.

Bearing the above in mind, the purpose of this chapter is to examine the evolution of collective duties in the premodern period from a few specific obligatory acts into a distinct category of duties shaping the boundaries of the moral community. The primary focus is on how scholars thought about collective duties in the late formative to early post-formative period, between the 9th and 14th centuries, and what they considered its most important characteristics. This will include a discussion of how duties are broadly understood in Islamic law, the relationship between *farḍ ‘ayn* (individual or ‘ayn-obligation) and *farḍ kifāya* (collective or *kifāya*-duty), the hierarchy between duties, *who* is obligated to perform and *when* the duty is suspended. Questions of what broad purpose these collective duties serve in Islamic law will also be considered, specifically, why did jurists feel the need to develop such a concept? This section raises additional questions relating to authority and responsibility: who determines what qualifies as a collective duty, who can command others to violence, who is responsible for fulfilling this duty, what type of knowledge is required, what role does geographic proximity play, etc.? Finally, the chapter outlines the principles jurists have proposed as justification for classifying a particular obligatory act as collective or individual. For instance, at points

the reasoning underlying a particular *kifāya* act relates to matters of religion; at other points, it pertains to a general concern for human welfare or an implicit concept of promoting societal betterment (*maṣlaḥah*), such as the justification behind caring for foundlings or marrying widows.⁷⁷

While it would be convenient to separate the discussion on *kifāya* into camps that track the different legal or theological schools (*madhhab*), no consistent patterns emerge to suggest that jurists' thoughts on *kifāya* diverged solely based on affiliation. At the same time, differences do exist and the relative importance given to these collective duties also varies, though this is often on what seems to be the scholar's personal preference as opposed to their particular school. This presents certain challenges in understanding the *kifāya* doctrine since it does not neatly fit into the standard divisions in Islamic law. That said, there is broad consensus with regard to how different jurists understand collective duties. As a result, the most intriguing information on the *kifāya* doctrine comes from jurists either providing greater detail on the basic doctrine that is agreed upon or advocating unconventional approaches.

⁷⁷ To some degree, the *farḍ kifāya* discussions cover similar themes found in the discourse on *maqāṣid* (objectives of the law) and may be a less formal pre-cursor to that discourse. For a broad overview of *maqāṣid*, see generally, Mohammad Hashim Kamali, "Maqāṣid al-Sharī'ah: The Objectives of Islamic Law," *Islamic Studies*, vol. 38, no. 2 (Summer 1999).

Explaining Kifāya

Having provided a broad framework for how duties are discussed in Islamic law, we can turn to an investigation of the concept of *kifāya* specifically. Ghazālī's definition of *kifāya*, endorsed by Zarkashī as the most "accurate" description of the concept, is as follows: "everything of religious importance that is sought to be obtained, but which does not place legal responsibility in one specific individual" (*kul muhimm dīnī yurād huṣūluhu wa-lā yuqṣad bihi ʿayn man yatawallāhu*).⁷⁸ He notes that Abū Ḥāmid al-Ghazālī (d. 505/1111) recognizes two aspects of the *kifāya* duty: the duty itself and the excuses that suspend the duty (*al-maʿādhīr al-musqīṭah*).⁷⁹ Nawawī (d. 676/1277) defines *farḍ kifāya* somewhat differently, approaching it from the perspective of non-performance: if a person of legal capacity, in a particular locality, does *not* perform then everyone in that locality will be sinful.⁸⁰

Abū Bakr al-Sarakhsī (d. 490/1096) provides a lengthy definition of *farḍ kifāya* as part of his discussion on the status of voluntary acts. He notes that voluntary acts, as well

⁷⁸ Zarkashī, *al-Bahr al-muhīt*, vol.1, 242.

⁷⁹ Abū Ḥamīd al-Ghazālī, *al-Wasīṭ*, vol. 7, ed. Aḥmad Maḥmūd Ibrāhīm (Cairo: Dār al-Salām, 1997), 5.

⁸⁰ Nawawī commentary in Abū Ishāq al-Shīrāzī, *al-Tanbīh fī al-fiqh ʿalā madhhab al-imām al-Shāfiʿī* (Egypt: Sharikat maktaba wa-maṭbaʿa Muṣṭafā al-Bābī al-Ḥalabī wa-awlādihi, 1951), 19-20.

as acts the Prophet encouraged people to perform, are not strictly speaking *farḍ*.⁸¹ One does not incur any sin by refusing to perform. However, the performance of the acts is obligatory for the collective such that if “people in a particular time period collude on forgoing supererogatory acts they will be forgoing what is obligated and thus be collectively liable” (*idhā ijṭama‘a ahl zaman ‘alā tark nafl kānū tārikīn li-farīḍa mushtarikīn fī al-ma‘tham li-anna bi-tark al-nafl yandaris shay’ min al-sharī‘a*).⁸² This of course raises the question as to how acts can be individually voluntary, but collectively obligatory? Sarakhsī reasons that collectively deciding to forgo voluntary acts, like supererogatory prayers, is problematic because the complete nonperformance of a voluntary act would effectively remove a part of the *Sharī‘a* (by which he means “religion”). On the other hand, an individual omission of a voluntary act does not rise to the level of “extinguishing” a part of the *Sharī‘a* and so there is no liability associated with it.⁸³

Sarakhsī further explains this by considering two purposes (*maqsūd*) behind voluntary acts. First, he says voluntary acts “disrupt Satan’s ambition” (*qaṭ‘ ṭama‘ al-shayṭān*) to interfere with the behavior of believers because the performance of optional acts indicates that obligatory acts, which take precedence, have already been performed.

⁸¹ Sarakhsī, *al-Mabsūṭ*, vol. 30, 263.

⁸² Sarakhsī, *al-Mabsūṭ*, vol. 30, 263.

⁸³ Sarakhsī, *al-Mabsūṭ*, vol. 30, 263.

In other words, the assumption is that supererogatory acts are only performed subsequent to completing mandatory duties. Second, these voluntary acts compensate for whatever deficiency there might be in a person's performance of individually obligated acts.⁸⁴ Sarakhsī considers both purposes crucially important and the threat of their disappearance due to the neglect of voluntary acts requires a solution. As a result, he frames the duty to perform these voluntary acts in *kifāya* terms: "performance is obligatory on people as a whole" (*fa-adā'uḥu 'alā al-nās farīdatun*). Immediate performance is generally not required, since these are open-ended obligations (*muwassa'*), except when widespread nonperformance threatens to extinguish the voluntary act.⁸⁵ Sarakhsī's primary concern is with preventing any alteration of the *Sharī'a* through acts of omission. He demonstrates the importance of this concern by contrasting two different types of omission: failure to perform a voluntary prayer and failing to be in a state of ritual purity prior to performing a voluntary prayer. In the first instance, refusing to perform voluntary prayers does not trigger individual liability. However, a

⁸⁴ Sarakhsī, *al-Mabsūṭ*, vol. 30, 263. Sarakhsī bases this on a Prophetic ḥadīth that states: "if there is anything lacking in the obligatory acts of the slave then God will say to his angels, place the supererogatory acts of my slave as compensation for the deficiencies in their obligatory acts." Sarakhsī, *Mabsūṭ*, vol. 30, 263. The closest equivalent of this ḥadīth I could find is in "Sunan al-Nasā'ī." See, Abū 'Abd al-Raḥmān al-Nasā'ī, *Kitāb al-sunan al-kubrā*, vol. 1, ed. Ḥasan 'Abd al-Mun'im Shalbī (Beirut: Resalah Publishers, 2001), 205-206.

⁸⁵ Sarakhsī, *al-Mabsūṭ*, vol. 30, 263.

person is liable if they perform a voluntary prayer while in a state of ritual impurity. The reason is that while performance of a voluntary prayer is optional, every element of a valid prayer, regardless of whether it is an optional prayer or not, is obligatory. Thus, while forgoing the performance of a voluntary prayer does not impact any legal rule (*ḥukm al-sharʿ*), neglecting an obligatory component of that prayer does.⁸⁶

Badr al-Dīn al-Zarkashī (d. 794/1392) divides *kifāya*-duties into two types. The first is comprised of acts that, when performed, satisfy the purpose of the duty completely and subsequent performance does not yield any additional benefit. In other words, an “exhaustible duty:” the performance of these acts by some people removes the duty from others.⁸⁷ The second is acts where the benefit of the duty is renewed each time the act is repeated, or an “inexhaustible duty.”⁸⁸ Examples of this type of *kifāya*-duty are the pursuit of knowledge, memorizing the Qurʾān and performing the funeral prayer. The “purpose of these acts is intercession” (*maqṣūduhā shafāʿah*) because they allow good deeds to intercede on behalf of the believer in his final accounting, which is why the duty

⁸⁶ Sarakhsī, *al-Mabsūṭ*, vol. 30, 263.

⁸⁷ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253. He specifically describes this exhaustible duty as one “in which you obtain the entire objective through [one performance] and no additional [performance] is accepted” (*mā yaḥṣul tamām al-maqṣūd minhu wa-lā yaqbal al-ziyāda*). Ibid.

⁸⁸ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253. He describes the inexhaustible duty as one where “the benefit renews with a performers repetition of the act” (*yatajaddad maṣlaḥa bi-takrār al-fāʿilīn lahu*). Ibid.

is addressed to everyone (*kull aḥad mukhāṭab bihi*).⁸⁹ The status of these acts as duties does not change regardless of whether someone fulfills them or not, but the burden of performing them diminishes after the first performance.⁹⁰ In other words, if these collective duties are performed, there is no longer a burden on anyone else to perform them; however, if someone does subsequently perform the act, they will be rewarded as though they had fulfilled a duty. In essence, they are inexhaustible duties. Zarkashī also notes that it is not permissible to forgo an inexhaustible collective duty unless someone else undertakes it and lifts the burden.⁹¹ For the exhaustible collective duty, any performance subsequent to completion of the obligation will not be considered performance of an obligatory act because after one completed performance of the duty, it ceases to exist.

Zarkashī advances an expansive definition of *kifāya* that includes various acts absent from the lists of other scholars. He takes Ghazālī to task for failing to include a broader set of collective duties in his book *al-Waṣīṭ*, claiming he leaves out acts relating to craftsmanship (*al-ḥarf*), industry (*al-ṣanāʿāt*) and livelihood (*qiwām al-maʿāsh*).⁹² He

⁸⁹ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253.

⁹⁰ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253.

⁹¹ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253.

⁹² In my own review of Ghazālī's *al-Waṣīṭ*, I found references to a more expanded notion of *kifāya* obligations as part of his discussion of the three categories of *kifāya*. One of those categories, included

contends that the omissions are consistent with the opinion of Ghazālī's teacher Imām al-Ḥarmayn al-Juwaynī (d. 478/1085).⁹³ Zarkashī vociferously argues that the opposite is true; he considers all these acts to be collective duties and penalizes their nonperformance.⁹⁴ It is not entirely clear what caused Zarkashī to hold this opinion since Ghazālī does offer an expansive definition of collective duties in an earlier work, *Iḥyā' 'ulūm al-dīn*, including tillage, cupping, tailoring and various other crafts, and so may not have been in disagreement with Zarkashī's view after all.⁹⁵

Categorizing *Kifāya* Duties

Despite the lack of explicit support from Islam's primary textual sources, in the formative and early post-formative periods jurists expanded the category of *farḍ kifāya* to contain at least fifteen different duties. These duties included a wide range of behavior with varying degrees of importance. Hence, an act as potentially serious as engaging in

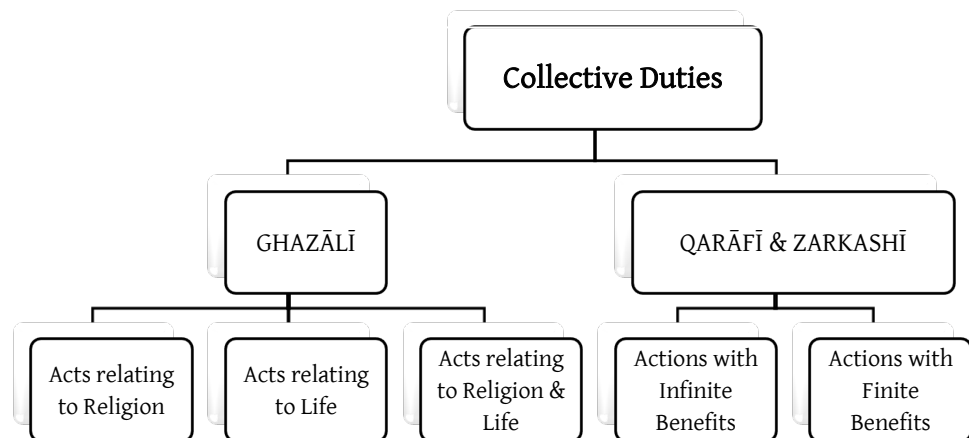
activities like "plowing" and "cultivation." Ghazālī, *al-Waṣīṭ*, vol. 7, 6. Hence, it is not quite clear what Zarkashī was basing his claim on.

⁹³ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 242.

⁹⁴ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 242.

⁹⁵ Abū Ḥāmid al-Ghazālī, *Iḥyā' 'ulūm al-dīn*, vol. 1, ed. Badawī Ṭabāna (Cairo: Dār Iḥyā' al-Kutub al-Arabiyya, 1957), 43. With regard to the dating of *Iḥyā'* in relation to *al-Waṣīṭ*, neither of the two books by Ghazālī that carry the title *al-Waṣīṭ* are mentioned prior to *Iḥyā'*. George F. Hourani, "A Revised Chronology of Ghazālī's Writings," *Journal of American Oriental Society* 104, no. 2 (1984): 292. See also, Frank Griffel, *Al-Ghazālī's Philosophical Theology* (New York: Oxford University Press, 2009), 13-20.

armed struggle is categorized together with something as routine as “returning a greeting.” In addition to *jihād*, funeral rites, “commanding right and forbidding wrong,” and acquiring knowledge, a range of other activities fell within the category of collective duties. These activities included religious rituals like the *adhān* (call to prayer) and congregational prayer, as well as economic redistribution, such as spending on the destitute beyond the obligatory alms-tax and distributing wealth in excess of one’s needs. Some scholars mention duties relating to social responsibility such as caring for foundlings, marrying widows, marriage in general, and feeding as well as clothing the poor. In a similar vein, certain etiquettes, presumably beneficial for social cohesion, were also considered obligatory for the community.



Ghazālī seems to be one of the first jurists to put forward categories of collective duties. He divides *kifāya* acts into three categories: acts relating to religion, to life, and to

both religion and life.⁹⁶ The first category relates to “religion alone” (*maḥḍ al-dīn*). Ghazālī cites examples he believes should not be “absent” from an Islamic polity. This includes “instituting proselytization using polemics” (*iqāmat al-da‘wa al-hijājiyya bi-l-‘ilm*) and “conquering with the sword” (*al-qahriyya bi-l-sayf*). It also includes activities that connect to the core tenants of the faith and its distinctive rites (*furū‘ al-dīn wa-shi‘ārihi*).⁹⁷ For instance, “giving life to the Ka‘aba” through the annual Hajj, promoting “right” behavior and returning the *salām* greeting. Ghazālī’s inclusion of returning the *salām* greeting is based on its mention in both the Qur’ān and *Sunna*. This also makes sense since duties in this category generally contain some group benefit (*maṣlaha kulliyya*) and “returning the *salām* greeting” demonstrates both social solidarity and group demarcation. Ghazālī offers a reason for including the duty to return a greeting in this category: the group benefit it provides is in promoting positive relations between Muslims. He considers it imperative that the dominions under Muslim control not be devoid of these activities, which he considers the essence of religion.⁹⁸

⁹⁶ Ghazālī, *al-Wasīṭ*, vol. 7, 6-7; Nawawī has a similar division as well, but does not include a compounded category. He says that collective duties pertain to religion and worldly affairs (*farūḍ al-kifāya amūr kuliyya tataliq bihā maṣālih dīniyya aw dunyawīyya*). Nawawī, *Rawḍa al-Ṭālibīn*, vol. 7, 418.

⁹⁷ Ghazālī, *Wasīṭ*, vol. 7, 6.

⁹⁸ Ghazālī, *Wasīṭ*, vol. 7, 6.

Ghazālī's second category includes duties relating to welfare (*al-ma'āsh*).⁹⁹ The first example is of the duty to remove harm caused by indigency by helping to satisfy people's basic needs.¹⁰⁰ Specifically, he says that this *kifāya*-duty can only be performed subsequent to completing the 'ayn-obligation to pay the alms tax or zakat. The *kifāya*-duty is simply an additional means by which to help alleviate the difficulties of those in need; if their needs persist then the duty to help persists as well.¹⁰¹ Within the category, Ghazālī also mentions other activities that people cannot survive without and must not be neglected such as commercial transactions, marriage, plowing, cultivation and cupping.¹⁰² Ghazālī's last category is a compound of the first two categories: duties relating to religion and life. This category of duties contains elements pertaining to religion alone while also accounting for livelihood and public welfare, for instance, the duty to testify (*taḥammul al-shahādāt*) or to assist judges in fulfilling people's rights (*i'ānat al-qaḍā' alā tawfiyat al-ḥuqūq*). Not only do these duties benefit public welfare and ensure subsistence ("relating to life"), they are also considered religious rites ("relating to religion").¹⁰³

⁹⁹ Ghazālī, *Wasīṭ*, vol. 7, 6.

¹⁰⁰ Ghazālī, *Wasīṭ*, vol. 7, 6.

¹⁰¹ Ghazālī, *Wasīṭ*, vol. 7, 6.

¹⁰² Ghazālī, *Wasīṭ*, vol. 7, 6.

¹⁰³ Ghazālī, *Wasīṭ*, vol. 7, 7.

Shihāb al-Dīn al-Qarāfī (d. 684/1285) categorizes *kifāya*-duties as part of a broader division of acts. He divides actions into two categories: actions with benefits that replicate with repetition and those whose benefits are not replicated.¹⁰⁴ While Qarāfī does not delineate between different kinds of benefit, his discussion puts forward at least four kinds. The first kind of benefit is the one that an individual acquires for performing a good deed because God will reward them for their act. This benefit attaches to all duties regardless of what additional benefits might be associated with the act. Aside from the benefit to individuals, there is also a benefit to third parties, generally communities, that gain from the performance of certain obligations. This is a benefit common to the *kifāya*-duties under discussion here. In all these duties some third party, whether one individual (i.e. someone saved from drowning) or an entire community (i.e. a town requiring help in its defense), benefits. Finally, there are a small number of duties that might be construed as beneficial to God. However, this framing is theologically problematic: God does not require a benefit nor could human acts bring benefit to God. Thus, we might

¹⁰⁴ Shihāb al-Dīn al-Qarāfī, *Anwār al-burūq fī anwāʿ al-furūq*, ed. Muḥammad Aḥmad al-Sirāj and ʿAlī Jumuʿa Muḥammad (Cairo: Dār al-Salām, 2001), 234.

think of “benefit to God” as symbolically beneficial to God or possibly as “beneficial to religion,” which broadens its scope significantly.¹⁰⁵

The first category is one that Qarāfi says the Lawgiver (i.e. God) has legislated on every individual (*shara‘ahu ṣāhib al-shar‘ alā al-a‘yān*) and allowed the benefits to multiply each time the act is repeated. Hence, Qarāfi, unlike others, does not create a division between finite and infinite benefits within the category of collective duties, but suggests that infinite benefits can only be attained through the performance of individual duties while collective duties can only result in finite benefits. An example of an act in this category is praying the midday prayer (*salāt al-ḡuhr*): each time you pray it you receive the benefits associated with the prayer. The amount of benefit is only limited by an individual’s ability to replicate the act within the designated time frame for the prayer. The benefits derived from these acts all serve to enhance one’s relationship with God by demonstrating submission (*al-khudū‘*), reverence (*ta‘ẓīm*) and subservience (*al-tadhallul*) to God; allowing intimate conversation with God (*munājāt*) and comprehension of God’s speech (*al-tafahhum li-khiṭāb*); presenting oneself (*muthūl*) before God; and following the

¹⁰⁵ For instance, a famous ḥadīth *qudsī*, reported in various collections, records the Prophet reporting God’s statement that “fasting is for me and I will reward it” (*al-ṣawm lī wa-anā ajzi bihi*). Aḥmad b. Ḥanbal, *Al-Musnad*, vol. 7, ed. Aḥmad M. Shākir (Cairo: Dār al-Ḥadīth, 1995), 41-42.

moral example God sends (*al-ta'addub bi-ādābihi*).¹⁰⁶ For the second category, acts whose benefit cannot be replicated, Qarāfi cites one illustrative example of a collective duty: saving someone from drowning, also a well-known example of a moral duty (to rescue) in Western philosophical literature. He notes that there is no additional advantage or benefit secured from diving back into the water to save someone that has already been rescued. Qarāfi notes that God designates these acts as collective duties in order to curtail unnecessary performance that will not render any further benefit (*ja'alahu ṣāhib al-shar' alā al-kifāya nāfiyyan li-l-'abath fī al-af'āl*).¹⁰⁷ Other acts also fall into this category, for instance, providing clothes for the needy and feeding the hungry.¹⁰⁸

Like Qarāfi, Zarkashī also divides collective duties into two parts relating to the benefit acquired. He raises this distinction as part of a broader question regarding the difference between how legal theorists (*al-uṣūliyyīn*) understand duties versus jurists (*fuqahā*). Legal theorists and jurists are not mutually exclusive categories, but Zarkashī is separating them to illustrate the difference between two different functions legal scholars were engaged in. When elaborating theory, legal scholars were involved in developing an overarching understanding of legal ideas and concepts without being

¹⁰⁶ Qarāfi, *Furūq*, 234.

¹⁰⁷ Qarāfi, *Furūq*, 234.

¹⁰⁸ Qarāfi, *Furūq*, 234.

constrained by the facts of any particular case. They utilized hypotheticals as well as actual cases and the legal-theoretical literature devotes significant space to developing linguistic approaches to reconciling potential conflict between the sources informing the law. On the other hand, the jurists, many of whom functioned outside the state's legal apparatus, were also consulted on actual legal cases by the lay public and judiciary, thus operated with great deference to practical considerations. Bearing the above in mind, these respective approaches are behind the conflict between theorists and jurists that Zarkashī is using to make his point about *kifāya*-duties with finite benefits. He notes that legal theorists eliminate *kifāya*-duties after their first performance while jurists allow the possibility that the second performance of these *kifāya*-duties might still fulfill the duty.

The jurists' position raises the question of how it is possible for the second performance of an act to be considered a duty when that duty has technically been suspended after it was first performed?¹⁰⁹ Nawawī's answer, as reported by Zarkashī, is that the phrase "the duty is suspended" (*farḍ al-kifāya yasqut*) actually means "the offense (of omission) is suspended" (*yasqut al-ḥaraj*). In other words, after the first performance, it is not an offense for a second group to forgo performance of the duty (*la ḥaraj 'alayhim fi tark hādhā al-fi'l*). However, if the second group does decide to perform, it still receives

¹⁰⁹ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253.

credit for performing a “duty” as if the performance had been simultaneous with the first performance.¹¹⁰ Abū Saʿd al-Mutawallī (d. 478/1085),¹¹¹ rejects this explanation by Nawawī and argues that the very definition of duty (*fard*) is an act whose omission results in liability. Hence, if, after an initial group performs a collective duty, there is no longer any offense or liability for forgoing performance then any subsequent performance of the same act cannot be considered fulfillment of a “duty.”¹¹²

Zarkashī introduces a two-part division to *kifāya*-duties as an attempt to solve this difference between theorists and jurists. The first type of *kifāya*-duty is where a single performance achieves the purpose of the duty and repeated performance yields nothing additional. This is the type of *kifāya*-duty that is suspended once it is performed by a sufficient number of people. The second type is where repeat performance of the act results in renewed benefits; the benefits are infinite.¹¹³ Examples of this second type of *kifāya*-duty include “pursuing knowledge” (*ishtighāl bi-l-ʿilm*), “memorizing the Qurʾān” (*hifẓ al-Qurʾān*) and “praying the funeral prayer” (*ṣalāt al-janāza*).¹¹⁴ In each of these

¹¹⁰ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 253.

¹¹¹ His full name was Abū Saʿd ʿAbd al-Raḥmān b. Maʿmūn al-Mutawallī. Born at Nīsābūr and died in Baghdad, Mutawallī was a Shafīʿī jurist and identified with Ashʿarī theology. See, D. Gimaret, “Al-Mutawallī,” EI2.

¹¹² Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 253.

¹¹³ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 253.

¹¹⁴ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 253.

examples, as well as others, Zarkashī says everyone is being addressed (*kull aḥad mukhāṭab bihi*) and they remain duties regardless of how many times they have previously been performed. Forgoing their performance is only possible if someone else undertakes the duty and if that happens then the liability of failing to perform is removed.¹¹⁵ Zarkashī’s solution is simply to suggest that Nawawī and Mutawallī are actually speaking about two different types of *kifāya*-duties and if we account for this distinction then both of their ideas can co-exist. An act can be considered a duty even after it is performed the first time because additional benefits can be acquired from subsequent performances; meaning its objective can continue to be achieved. However, Zarkashī’s solution still fails to address Mutawallī’s contention that additional performances of an act that is a collective duty cannot be considered fulfillment of a “duty” because liability no longer exists for failing to perform, which is integral to the definition of duty in the first place.¹¹⁶

Alongside framing how *kifāya*-duties should be categorized, some jurists also discuss the reasoning behind an act’s classification as *kifāya*. However, when jurists discuss their reasoning they generally do so without consideration for the category of

¹¹⁵ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253.

¹¹⁶ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 253.

kifāya-duties as a whole. In most instances, they simply comment on what justification lies behind a specific duty's inclusion into the *kifāya* category. For instance, when discussing the duty to pursue knowledge, some jurists note the importance of acts that are "useful to religion" or that allow one to "respond to heresies."¹¹⁷ In the same vein, they suggest that pursuing knowledge, specifically religious knowledge, gives "life to the *Sharī'a*."¹¹⁸ When discussing *jihād*, the justification changes to "fortifying" or "strengthening" the faith, or enhancing its prestige.¹¹⁹ Likewise, for certain duties relating to social responsibility, like caring for foundlings, jurists argue that the duty stems from an obligation to save lives, specifically children, and to cooperate in "performing good works."¹²⁰ Unfortunately, the reasoning classifying an act as a collective duty lacks any systematization, such that the same reasoning cannot be

¹¹⁷ Khaled El-Rouayheb, "Sunni Muslim Scholars on the Status of Logic, 1500-1800," *Islamic Law & Society*, vol. 11, no. 2 (2004): 227.

¹¹⁸ Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Kasb*, ed. Suhayl Zakkār (Damascus: 'Abd al-Hādī Ḥarsūnī, 1980), 72; Sarakhsī, *al-Mabsūṭ*, vol. 30, 262-63.

¹¹⁹ Shams al-Dīn al-Sarakhsī, *Uṣūl al-Sarakhsī*, vol. 2, ed. Abū al-Wafā' al-Afghānī (Beirut: Dār al-Kutub al-'Ilmiyya, 1993), 289. According to Baber Johansen, the original edition was published at Hyderabad at the Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyya, in two volumes. Baber Johansen, "Dissent and Uncertainty in the Process of Legal Norm Construction in Muslim Sunnī Law," in *Law and Tradition in Classical Islamic Thought: Studies in Honor of Professor Hossein Modarressi*, eds. Michael Cook, et al. (New York: Palgrave Macmillan, 2013), fn. 23, pg. 143. This version by Dār al-Kutub al-'Ilmiyya seems to be a reprint of the original. Osman Taştan notes that there are at least two other editions of the text. Osman Taştan, "al-Sarakhsī (d. 483/1090)," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, eds. Oussama Arabi, David S. Powers and Susan A. Spectorsky (Leiden: Brill, 2013), 250fn83.

¹²⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 8, ed. 'Alī Muḥammad Mu'awwaḍ (Beirut: Dār al-kutub al-ilmiyya, 1999), 34; Ghazālī, *Wasīṭ*, vol. 2, 303.

applied to other acts in order to include or exclude them as *kifāya*-duties as well. Hence, not every act that saves a life or is “useful to religion” is classified as a collective duty. Yet, despite the absence of formal principles from which to derive collective duties, jurists did seem to share a sense of the law’s “higher objectives,” which they appealed to in their discussions and attendant justifications of these duties. For many jurists, collective duties were a vehicle through which to achieve a vague objective of bettering society (*maṣlaḥah*). Of course, this could only be done through the support of the “sources” of law, which meant that jurists sought to creatively interpret the texts more expansively than a *prima facie* examination might indicate. Khaled Abou El-Fadl describes this process, noting that:

Legal systems are authority bound, and quite often a legal system will have a set of texts that it considers authoritative and binding. Jurists functioning within a particular legal culture normally do not feel at liberty to ignore authoritative texts considered central to that culture. If jurists aim to achieve particular normative objectives, they do so by engaging in a linguistic practice according to which they creatively interpret or construct the meaning of authoritative texts.”¹²¹

‘Ayn versus Kifāya

¹²¹ Khaled Abou El Fadl, “Soul Searching and the Spirit of Shari‘a: A Review of Bernard Weiss’s *The Spirit of Islamic Law*,” *Washington University Global Studies Law Review*, vol. 1 (2002): 555.

Another avenue to better understand the *kifāya* doctrine is by examining the relationship between *farḍ ʿayn* (individual obligation) and *farḍ kifāya* (collective duty).¹²² The basic difference between these two categories of obligatory acts revolves around *who* bears the burden of performance. For *farḍ ʿayn*, the burden is on each individual; everyone is required to perform. For *farḍ kifāya*, the obligation is on the entire community; however, as long as some people within that particular community perform, the duty is fulfilled for everyone else. This is the standard formulation already discussed which has widespread agreement.¹²³ However, in addition to this basic difference between individual obligations and collective duties, scholars also construct a hierarchy *between* the two sets of obligations/duties as well as *within* each of them.

Basic Difference

Ghazālī captures the difference between *ʿayn* and *kifāya* in a slightly different way from the standard formulation. He notes that a *kifāya*-duty is one where the objective of performance is to achieve some legal (*sharʿī*) purpose whereas the individual obligation

¹²² These two terms appear in different formulations within the legal literature, for instance, *farḍ ʿalā al-kifāya*, *wājib ʿalā al-kifāya*, *farḍ al-kifāya*, *wājib kifāʾī* and their *ʿayn* equivalents.

¹²³ For instance, see Shāfiʿī, *al-Risāla*, ed. Aḥmad M. Shākir (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.), 362 & 366; Shaybānī, *Kitāb al-Kasb*, 71; Ibn Ḥazm, *Muḥallā*, vol. 2, 143; Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 243-244.

is simply a means of testing an individual.¹²⁴ In other words, if we frame it within our earlier typology of benefits, the collective duty has a purpose that provides a benefit to third parties external to the performer whereas the individual obligation's purpose focuses exclusively on benefit to the performer. Āmidī notes that from the perspective of rendering something obligatory, there is no difference between the individualized obligation (*wājib al-ʿayn*) and collective obligation (*al-wājib ʿalā al-kifāya*): they encompass everything obligatory.¹²⁵ He notes that this is contrary to the opinion of people who say that a difference exists because an individual obligation cannot be satisfied through the actions of others, but a collective duty can. Āmidī argues, similar to his critique of the Ḥanafīs *farḍ* and *wājib* distinction, that this is a semantic difference about the manner in which an obligation is removed, but does not concern the true nature of either the individual obligation or collective duty.¹²⁶ He illustrates this point by noting how both the person who commits apostasy and the one who commits murder face a mandatory sentence of death. However, the mandatory sentence is waived through the apostate's repentance, whereas a murderer's repentance does not automatically remove punishment. The murderer's repentance requires an additional step: acceptance by the

¹²⁴ Ghazālī, *al-Wasīṭ*, vol. 7, 6.

¹²⁵ Āmidī, *Iḥkām*, vol. 1, 137.

¹²⁶ Āmidī, *Iḥkām*, vol. 1, 137.

victim's kin. Returning to his critique of the *farḍ* and *wājib* distinction, Āmidī states that semantically we would refer to both scenarios described as death sentences even if there is an easier mechanism for relief in one case versus the other.¹²⁷

Qarāfī begins his discussion by creating a distinction between duties and non-compulsory good acts (*mandūbāt*). He moves various acts commonly classified as duties into the category of good actions. Qarāfī notes that the classification of duties as either *kifāya* or *ʿayn* is similar to how classifications occur for non-compulsory good actions (*mandūbāt*). For instance, the call to prayer (*adhān*), signaling the commencement of prayer (*iqāma*), returning and giving salām (*taslīm*), praising God after sneezing (*tashmīt*), and rituals relating to the dead are classified as collective good actions (*kifāyat mandūbāt*). Similarly, there are individual good acts (*aʿyān mandūbāt*) like praying *witr*, fasting on favored days, praying on either Eid, circumambulation outside the state of pilgrimage and non-compulsory charity.¹²⁸

In *al-Baḥr al-Muḥīt*, Zarkashī also introduces his discussion of *kifāya* by distinguishing between *kifāya* and *ʿayn*. He says it is generally believed that collective duties are considered duties that are performed without consideration for who the

¹²⁷ Āmidī, *al-Iḥkām*, vol. 1, 137.

¹²⁸ Qarāfī, *Furūq*, 234; Shihāb al-Dīn al-Qarāfī, *al-Dhakhīra*, vol. 1, ed. M. Būkhūza (Beirut: Dār al-Gharb al-Islāmī, 1994), 83.

performer is whereas individual obligations are primarily concerned with the individual performer. Although he recognizes this as largely true, he notes that it is not entirely correct all the time. Zarkashī points out that the *kifāya* context also considers the performer because *who* performs will determine how punishment and reward for performance or nonperformance is assigned. However, in the *kifāya* context, while it is useful to know who performs, the intention is not to assign performance to a particular person. The primary concern is just that performance take place.¹²⁹ Having provided his explanation of the difference, Zarkashī critiques the Mu'tazilite opinion that the *kifāya* and *ʿayn* difference is based on genus (*jins*). He contends that the difference actually does not rise to this level and is simply a distinction of species (*nawʿ*) within the same genus.¹³⁰ He notes that both species of obligatory acts must be carried out. Just as the individual obligation is incumbent on everyone with legal capacity, the collective duty penalizes everyone with legal capacity when no one performs, but satisfies the duty for everyone if an adequate number do perform.¹³¹ Both duties have the same cumulative objective: to acquire all benefits associated with performance.

¹²⁹ Zarkashī, *al-Bahr al-muhīt*, vol.1, 242.

¹³⁰ Zarkashī, *al-Bahr al-muhīt*, vol.1, 242.

¹³¹ Zarkashī, *al-Bahr al-muhīt*, vol.1, 242.

Hierarchy between Obligations

Although many scholars allude to a hierarchy between different types of obligatory acts, and between collective duties themselves, there is no agreed upon framework for how to consider these duties in relation to each other. The general consensus is that individual obligations take precedence over collective duties, although there are some prominent dissenting views. However, there is surprisingly little substantive discussion on how to prioritize certain collective duties over other ones despite the evident need for such a discussion given the wide spectrum of duties that are labeled as *kifāya*. For instance, there is relative absence of instruction on whether the *jihād* duty should take precedence over the duty to attend a funeral. While scholars generally fail to articulate a preference between two collective duties, an implied hierarchy likely did exist based on the relative significance of different duties, such as a preference for fighting an attacking enemy versus attending someone's last rites.

Scholars who comment on the hierarchy of obligatory acts often construct a very simplistic framework with regard to the "types" of acts that should receive precedence in performance. For instance, Ibn 'Abd al-Barr (d. 463/1071) says that collective duties

are preferred over both voluntary (*taṭawwuʿ*) and supererogatory (*al-nāfila*) acts.¹³²

Sarakhsī articulates the common view that individual obligations are more important than collective duties and supports this view with the Prophetic *ḥadīth* that “nothing is better than *jihād* except for the obligations.”¹³³ He considers *jihād*, as mentioned in the *ḥadīth*, to be a collective duty while “obligations” refers to individual obligations. Similarly, ‘Alāʾ al-Dīn al- (d. 582/1191) raises the issue of the hierarchy of obligations in his discussion on adjudication. He mentions a situation where a judge is faced with the choice of attending a funeral or presiding over a case where he has to “render judgment.” Both are collective duties, but the judge should excuse himself from participating in the funeral and give preference to the adjudication. The deceased possesses a right to have other Muslims attend his funeral, but it is secondary in this scenario. Of course, technically speaking, this does not demonstrate a preference between two collective duties at the time of performance. Rather, in this case “rendering judgment” is a collective duty that has been specifically assigned to that judge (essentially becoming a quasi-individual duty) and takes precedence over the non-assigned collective duty of

¹³² Ibn ‘Abd al-Barr, *Kitāb al-Istidhkār*, vol. 7, ed. ‘Abd al-Muʿtī Amīn Qalʿajī (Damascus: Dār Qutayba li-al-Ṭibāʿa wa-l-Nashr, 1993), 215.

¹³³ Shams al-Dīn al-Sarakhsī, *Sharḥ al-siyar al-kabīr*, ed. by Ṣalāh al-Dīn al-Munjid (Cairo: Maʿhad al-Makḥṭūʿāt, n.a.) 24.

attending a funeral prayer, which anyone can fulfill.¹³⁴ Ibn Taymiyya (d. 728/1328) notes that collective duties like pursuing knowledge and *jihād* take precedence over (*quddimat* ‘*alā*) the collective duty to get married, as long as you do not fear creating hardship in the process (*lam yakhsha al-‘anat*).¹³⁵

Qarāfi raises the hierarchy of different obligations as part of his discussion in *al-Furūq*, specifically the difference “between the principle of duties and rights that take precedence over Hajj and those that do not take precedence” (*bayna qā‘idat al-wājibāt wa-al-ḥuqūq allatī tuqaddam ‘alā al-ḥajj wa-bayna qā‘idat mā lā yuqaddam ‘alayhi*).¹³⁶ He begins by noting a couple general, common sense principles. First, the acts which have a restricted, narrow time frame (*muḍayyaq*) should take precedence over those that are more open-ended (*muwassā‘*). The reasoning he gives is simple: since God has placed narrow time restrictions on these acts they must be more important to Him (*al-taḍyīq*

¹³⁴ ‘Alā’ al-Dīn al-Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 7, ed. ‘Abbās Aḥmad al-Bāz (Beirut: Dār Kutub al-‘Arabī, 1974), 10.

¹³⁵ Ibn Taymiyya, *al-Fatāwā al-kubrā*, vol. 5, eds. Muḥammad ‘Abd al-Qādir ‘Aṭā and Muṣṭafā ‘Abd al-Qādir ‘Aṭā (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1987), 450. Of course, this is may be a logical consequence of Ibn Taymiyya not considering marriage to be a *kifāya*, unlike other scholars. See for example, ‘Alā’ al-Dīn al-Samarqandī, *Tahfat al-Fuqaha*, vol. 1 (Beirut: Dār al-‘Ilmiyya, 1984), 117; Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 2, 228; Shīrāzī, *Tanbih*, 109. Ibn Taymiyya also mentions that Abū Ya’lā al-Ṣaghīr and Ibn Mūnī said marriage was a collective duty not a *sunna*. Ibn Taymiyya, *al-Fatawa al-Kubrā*, vol. 5, 450. He does acknowledge Marwazī’s opinion that there is consensus on the collective duty to marry a widow (*tazwīj ayāmā farḍ kifāya ijma‘an*). Ibn Taymiyya, *Fatawa al-Kubrā*, vol. 5, 452.

¹³⁶ Qarāfi, *Furūq*, 650.

yush'ir bi-kathrat ihtimām ṣāhib al-shar' bi-mā ja'alahu muḍayyaqan).¹³⁷ Second, those acts that require immediate (*fawri*) performance take precedence over those that can be delayed (*tarākhi*). Third, he says preference should be given to those acts that you fear might lapse (*fawāt*) due to nonperformance versus those that you do not have the same fears about. For instance, the preservation of another person's wealth takes precedence over prayer when you fear that the wealth will be lost (*yuqaddam ṣawn māl al-ghayr 'alā al-ṣalāh idhā khushiya fawātuh*).¹³⁸ Qarāfi notes that this connects to the idea that rights owed to humans (*ḥaqq al-'abd*) can at times get precedence over rights owed to God (*ḥaqq Allāh*), though he points out that jurists differ on this point.¹³⁹

Within this discussion, Qarāfi also notes that *farḍ 'ayn* should be performed prior to *farḍ kifāya* because the “act that is commanded of every person of legal capacity must be preferred in its completion over what is commanded of only some” (*ṭalab al-fi'l min jamī' al-mukallafīn yaqtaḍi arjaḥiyyat mā ṭuliba min al-ba'd fa-qat*).¹⁴⁰ Furthermore, like other jurists, he also argues on the basis of the relative benefits that are gained from performance of the *kifāya* versus *'ayn* duties. Qarāfi notes that *kifāya*-duties rely on

¹³⁷ Qarāfi, *Furūq*, 650.

¹³⁸ Qarāfi, *Furūq*, 650.

¹³⁹ Qarāfi, *Furūq*, 650.

¹⁴⁰ Qarāfi, *Furūq*, 650.

benefit not being replicated by repeated performance, whereas *ʿayn*-obligations are the opposite: additional performances replicates benefit. In his view, any act whose repeated performance yields additional benefits in every case (*fī jamīʿ ṣuwarihi*) is superior to acts where additional benefits only occur in limited cases.¹⁴¹

Ghazālī provides some of the most extensive remarks on the relationship between *ʿayn* and *kifāya* as part of broader comments he makes regarding the culture of “debate” (*munāẓarah*) that developed during his time. He laments the close ties between scholars and the state, a relationship he says contributes to the development of different legal schools, various legal opinions and even sects. As a result of this state of affairs, Ghazālī says scholars, and subsequently laypeople, become obsessed with debating intricate questions of religion to the detriment of more important tasks. While he appreciates the need for these types of discussions, he is uncomfortable with how much they had come to dominate the concerns of jurists. Hence, he outlines eight conditions to serve as a guideline for engaging in such disputations. Among these, Ghazālī states, is the idea that the pursuit of truth, as a collective duty, must be appropriately prioritized. Specifically, he says that a person should not be “occupied with collective duties when they have yet to complete their individual obligations” (*man ʿalayhi farḍ ʿayn fa-shṭaghil bi-farḍ kifāya*),

¹⁴¹ Qarāfī, *Furūq*, 650.

even if the purpose behind the *kifāya*-duty is “search for true understanding of religion” (*ṭalab al-ḥaqq min al-dīn*).¹⁴² Simply put, Ghazālī does not consider the pursuit of truth (*ḥaqq*) to take precedence over what is legally and individually obligatory. He takes a harsh view towards individuals who use rare circumstances as justification to set aside individual obligations in order to pursue other tasks. For instance, Ghazālī is unconvinced by the person who justifies forgoing obligatory prayers in order to weave cloth, arguing that cloth is necessary to cover up nakedness during prayer. He considers this an insufficient basis for formulating a rule that allows you to abandon an individual obligation and compares it to how jurists preoccupy themselves with minor legal debates in pursuit of truth while neglecting obligations on which there is consensus.¹⁴³ For him the governing rule is clear: individual obligations must take precedence over collective duties.

That said, within the category of collective duties, Ghazālī is one of the few jurists who explicitly discusses a hierarchy and considers it illegitimate to perform less important *kifāya*-duties over more important ones. In other words, while some may consider “pursuit of the truth” a collective duty, there are other more significant *kifāya*

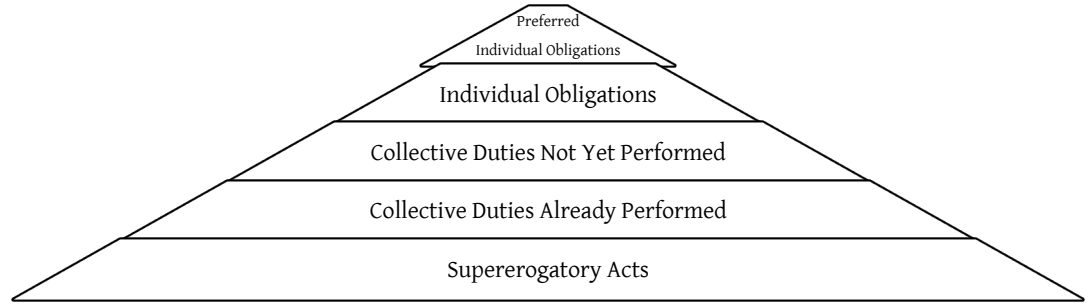
¹⁴² Ghazālī, *Iḥyāʾ*, vol. 1, 43.

¹⁴³ Ghazālī, *Iḥyāʾ*, vol. 1, 43.

duties that must receive precedence. Ghazālī illustrates this point by discussing the hypothetical of an individual who has the power to provide water to a group that is dying of thirst, but instead decides to learn the procedure for cupping. Both are collective duties and the individual justifies his preference by saying that if the cupping procedure disappears from a particular locality, the population of that area would suffer irreparable harm. Furthermore, he argues that even in cases where there are a sufficient number of cuppers, cupping remains a collective duty that must be learned. Ghazālī dismisses this line of reasoning because it fails to prioritize *kifāya*-duties appropriately based on the level of performance that has already occurred: coming to the aid of people moribund due to thirst is an unperformed collective duty, whereas the cupping duty is already being performed.¹⁴⁴ Hence, Ghazālī suggests that a hierarchy exists between collective duties such that unperformed duties must receive preference over ones already fulfilled, even if repetition of previously performed duties will let you attain additional benefit (i.e. inexhaustible duty).

At another point, while warning of vanities people develop in relation to having performed supererogatory acts, Ghazālī constructs a hierarchy of acts (obligatory and supererogatory), as expressed in the diagram below:

¹⁴⁴ Ghazālī, *Iḥyāʾ*, vol. 1, 43.



As shown above, Ghazālī begins by placing all obligatory acts (*farā'id*) above supererogatory acts (*nawāfil*).¹⁴⁵ Next, he gives individual obligations precedence over collective duties.¹⁴⁶ Up to this point, the proposed hierarchy is in line with most other jurists. However, unlike other jurists, Ghazālī continues to set up further hierarchies *between* the obligatory acts. He divides collective duties between those already performed and those yet to be performed (*taqdīm farḍ kifāya la qā'im bihi 'alā ma qāma bihi ghayruhu*). For individual obligations, which must be performed regardless of prior performance, Ghazālī constructs a hierarchy on the basis of the relative importance of the obligation, considering some individual obligations to be more crucial than others.¹⁴⁷

While the general consensus seems to be that individual obligations take precedence over collective duties, there are scholars who argue the opposite. The most

¹⁴⁵ Supererogatory acts are optional acts that one is encouraged, but not required, to perform.

¹⁴⁶ Ghazālī, *Iḥyā'*, vol. 3, 391.

¹⁴⁷ Ghazālī, *Iḥyā'*, vol. 3, 391-392. In addition, Ghazālī makes one other note, saying that obligations can be separated into those that require you to act (positive obligation) and those that require the omission of some action (negative obligation). Between these two, he preferences fulfilling positive obligations before negative ones. *Ibid.*, 392.

oft-cited opinion in this regard is from Imām al-Ḥarmayn al-Juwaynī who states that *farḍ kifāya* are more “among the acts pleasing to God, thus *kifāya*-duties are more elevated in status than the ‘*ayn*-obligations” (*qiyām bi-mā huwa furūḍ al-kifāyāt...alā min funūn al-qurubāt min farā’iḍ al-‘ayān*).¹⁴⁸ The reasoning he offers is that for individual obligations, recompense for performing or failing to perform is affixed to one person. However, omission of a collective duty places liability on everyone regardless of rank or station (*law farīḍa tuṭal farḍ min furūḍ al-kifāyāt la-‘amma al-mā’tham ‘alā al-kāffa ‘alā ikhtilāf al-rutab wa-l-darajāt*). Furthermore, he posits that it is not possible to adequately assign a value to the performance of deeds on behalf of the entire community, but that it certainly exceeds the value of performing them solely for one’s self.¹⁴⁹

In his discussion of obligatory acts, Zarkashī also raises the question of whether a collective duty should actually take precedence over an individual obligation. He begins by noting Bāqillānī’s position that in general it is permissible to consider some obligatory acts “more obligatory” (*awjab*) than others just as one considers some “*sunnaic*” acts more authoritative than others, once again contrary to the Muṭtazalī position.¹⁵⁰ He also

¹⁴⁸ Abū al-Ma‘ālī al-Juwaynī, *Ghiyāth al-Umam fī iltiyāth al-ẓulam*, eds. Muṣṭafa Ḥilmī and Fu’ād ‘Abd al-Mun‘im Aḥmad (Alexandria: Dār al-Da‘wa, 1979), 260-261.

¹⁴⁹ Juwaynī, *Ghiyāth*, 260-261; See also, Introduction by Aḥmad Ḥāj Muḥammad Shaykh Māhī in Mawardi, *al-Ḥāwī al-kabīr*, vol. 1, 14.

¹⁵⁰ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 184.

notes Ibn al-Qushayrī's opinion that the action whose absence results in greater admonition should be considered of greater importance, hence, belief in God should precede performing ablution.¹⁵¹ For the *kifāya* context, Zarkashī says the argument is that performing a *kifāya* act not only removes the obligation from the performer, but also from other people while performing an individual obligation only removes the obligation from an individual performer and no one else (*al-qiyām bi-farḍ al-kifāya awlā min al-qiyām bi-farḍ al-ʿayn li-annahū yasquṭ fiha al-farḍ ʿan nafsīhi wa-ʿan ḡhayrihi wa-fī farḍ al-ʿayn yasquṭ al-farḍ ʿan nafsīhi fa-qaṭ*).¹⁵² Hence, the collective duty has a greater impact and is arguably more beneficial. Zarkashī mentions that this preference of *kifāya* over *ʿayn* has been attributed to various scholars, including Abū Ishāq al-Isfarāyīnī (d. 418/1027) in his *Sharḥ kitāb al-tartīb*, Abū Muḥammad al-Juwaynī (d. 438/1047) in his *al-Muḥīṭ bi-madhab al-Shāfiʿī* and, his son, Imām al-Ḥaramayn in *al-Ghiyāthī* (as it is popularly known).¹⁵³

However, Zarkashī argues that a correct reading of the above-mentioned scholars' opinions reveals that they did not in fact prefer *kifāya* over *ʿayn*.¹⁵⁴ Rather, Zarkashī believes their opinion pertained to the relationship between broader genera

¹⁵¹ Zarkashī, *al-Bahr al-muḥīṭ*, vol. 1, 184.

¹⁵² Zarkashī, *al-Bahr al-muḥīṭ*, vol. 1, 251.

¹⁵³ Zarkashī, *al-Bahr al-muḥīṭ*, vol. 1, 251; see also, ʿAlāʾ al-Dīn al-Mardāwī, *al-Taḥbīr sharḥ al-taḥrīr fī uṣūl al-fiqh*, vol. 1, ed. ʿAbd al-Raḥmān b. ʿAbd Allah al-Jubayn (Riyadh: Maktabah al-rushd, 2000), 883.

¹⁵⁴ Zarkashī, *al-Bahr al-muḥīṭ*, vol. 1, 251; see also, Mardāwī, *al-Taḥbīr*, vol. 1, 883.

(*jins*) of acts as opposed to specific individual obligations. In other words, these scholars favored certain types of acts over others (*fā-inna kalāmahum innamā huwa fī al-qiyām bi-hādhā al-jins afḍal min dhālika*).¹⁵⁵ He adds that when Juwaynī says that carrying out a collective duty demonstrates “distinction” (*mazāyā*) this does not necessarily mean “preference” (*afḍaliyya*). More importantly, he mentions a comment by Shāfi‘ī, whose school all the aforementioned scholars belonged to, which argues that ‘*ayn* is preferred over *kifāya*. Shāfi‘ī says that it is detestable (*makrūh*) to interrupt circumambulation during the Hajj by performing the funeral prayer or any optional act of devotion (*rawātib*) because it would mean suspending an individual obligation for a collective duty.¹⁵⁶ For Zarkashī, this is another reason why we cannot read these scholars as having preferred collective duties over individual obligations since it is inconceivable to him that Shāfi‘ī jurists would diverge from the opinion of their school’s eponym on such a crucial matter.

Zarkashī also reports that Kamāl al-Dīn b. al-Zamlakānī’s (d. 727/1327) explanation for preferring *kifāya* over ‘*ayn* relates to situations where a collective duty is assigned to a specific person and in that case becomes an individual obligation for him. Hence, when comparing an “assigned” collective duty to an individual obligation,

¹⁵⁵ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 252.

¹⁵⁶ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 252.

Zamlakānī notes that some scholars permit the collective duty to receive preference. However, if the collective duty is not assigned, then the individual obligation remains preferable.¹⁵⁷

Who is Obligated?

In analyzing an obligatory act, one of the central questions of juristic inquiry is who should be obligated to fulfill a collective duty. Despite “community” being so central to the *kifāya* doctrine the term is never explicitly defined by scholars. On its face, this would make it difficult to determine what exactly the boundaries are, geographic or otherwise, that define the collective that is duty-bound to carry out the *kifāya* acts. Does this collective include the population of a particular town, a city, a larger geographic area or the entire Muslim community that existed at the time? Although the legal literature does not have any readily available answers, scholars are not particularly discomfited by this and seem to operate on an implicit understanding of what the collective comprises. In fact, it is through their discussion of *kifāya*-duties that they define the boundaries of this moral community.

¹⁵⁷ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 251.

For instance, one part of this discussion relates to whether individual members of a community are responsible for performing the collective duty. Jurists initially determine whether someone is eligible to perform any obligatory act by asking whether they satisfy the requisite legal standard to be held accountable (*taklīf*). For an individual to be legally accountable (*mukallaf*) he must, among other things, be free, sane, healthy and mature.¹⁵⁸ An individual who fails to meet any element of this standard is excused from performance. Zarkashī holds that those exempt from performing obligations due to a lack of legal capacity (i.e. minors, mentally unfit, etc.) are also excused from *kifāya*-duties. However, in specific circumstances, certain duties can be performed by minors under adult supervision, for example leading a funeral prayer.¹⁵⁹ As discussed in greater detail in the chapter on *jihād*, this exemption is particularly relevant when jurists consider whether slaves are expected to perform *kifāya*-duties. In these cases, the general rule, as noted by Ibn Mufliḥ, is that *kifāya* duties are only obligatory for free males, not slaves, regardless of whether the slave is commanded to perform by his master or even by a Muslim ruler.¹⁶⁰ Of course, there are certain exceptions to this rule, which are

¹⁵⁸ Ibn Ḥazm, *Muḥallā*, vol. 2, 143.

¹⁵⁹ Zarkashī, *al-Bahr al-muhīṭ*, vol. 1, 249.

¹⁶⁰ ‘Abd Allāh Muḥammad Ibn Mufliḥ, *Kitāb al-Furūʿ*, vol. 6, ed. ‘Abd Allāh al-Turkī (Beirut: Al-Resalah Publishers, 2003), 179.

discussed below. Legal capacity is a prerequisite and, as Āmidī notes, collective duties are considered complete based on a sufficient number of legally capable people stepping forward to fulfill them.¹⁶¹

Having satisfied the general guidelines for legal responsibility, jurists turn their attention to the level of accountability that is required of an individual in relation to a specific collective duty. Context plays an important role here and various scenarios are examined to determine the extent to which it might affect the obligatory act. Bernard Weiss summarizes the legal reasoning involved as follows: “with every obligatory act it is possible to ask whether its obligatory character is affected in any way by extenuating circumstances, either by being eliminated entirely or by being attenuated in some way.”¹⁶² Many jurists begin by investigating how the command is constructed linguistically to determine where legal responsibility should be placed for a particular duty. For instance, Shīrāzī discusses *farḍ kifāya* while commenting broadly on the idea of God’s speech (*khiṭāb*). He explains that if the speech is made using non-specific language (*lafẓ al-‘umūm*) then everyone who can reasonably be considered an addressee of the speech is in fact being addressed and must carry out the performance demanded. The

¹⁶¹ Āmidī, *Iḥkām*, vol. 1, 137.

¹⁶² Weiss, *God’s Law*, 2.

only exception is for situations involving collective duties.¹⁶³ In the *kifāya* context, even with language of general import, performance of the duty is not required for everyone. Fakhr al-Dīn al-Rāzī (d. 606/1210) notes that if a command addresses a group then it either speaks to them as a collective or individually. If the command is to the group collectively, then the performance of a group's members is mutually contingent (*fi'l al-ba'd*). An example of this would be the congregational Friday prayers (*salāt al-jum'a*): an individual cannot perform Friday prayers alone. In order for an individual performance of Friday prayers to be valid there must be communal performance of the prayer. On the other hand, Rāzī notes that if every individual in the group is addressed, then the command is a collective duty (*furūd al-kifāyāt*).¹⁶⁴ This is because the duty's objective can be attained through a sufficient number of people performing and without needing the entire group to perform. For example, Rāzī notes that *jihād*'s objectives are to "protect Muslims" and "humiliate the enemy," both of which can be accomplished through the efforts of some people satisfying the duty for everyone else.¹⁶⁵

¹⁶³ Shīrāzī, *al-Luma'*, 63.

¹⁶⁴ Fakhr al-Dīn al-Rāzī, *al-Maḥsūl fī 'ilm uṣūl al-fiqh*, vol. 2, ed. Ṭaha Jābir Fayāḍ al-'Alwānī (???; Mu'assasah al-Risālah, n.a.), 185.

¹⁶⁵ Rāzī, *Maḥsūl*, vol. 2, 186.

Zarkashī also discusses this distinction when considering where legal responsibility for the *kifāya* command lies: is the command addressed to everyone (*kull*) or some (*baʿḍ*)? He notes that the majority of scholars believe the *kifāya* command is required of everyone collectively (*ʿibārat al-aktharīn annahu wajaba ʿalā al-jamīʿ*), but there are others who believe it is designated to each person individually (*wajaba ʿalā ʿayn kull wāḥid*).¹⁶⁶ Regarding the opinion that the act is collectively obligatory, Zarkashī puts forward two opinions. The first requires performance from every person of legal capacity (*wājib ʿalā jamīʿ al-mukallaḥīn min ḥaythu innahu jamīʿ*). The second obligates every individual, regardless of legal capacity (*wājib ʿalā kull wāḥid*). In this case, as long as some perform the obligation, the burden drops from others; if none perform, then they are all sinful.¹⁶⁷ Additionally, Zarkashī highlights a key difference between these two opinions on the issue of how “responsibility” should be assigned when an obligatory act is not performed. In the first case, where the duty is that of individuals with legal capacity, blame is assessed on the basis of the person while in the second case, where everyone is obligated, only performance is considered (*ʿalā al-awwal taʿthīm kull wāḥid yakūn wāqīʿan bi-l-dhāt wa-ʿalā al-thānī bi-l-ʿarḍ*).¹⁶⁸ Some scholars critique assigning blame on the basis

¹⁶⁶ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 243.

¹⁶⁷ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 243.

¹⁶⁸ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

of performance because it creates an invalid abrogation of the command. They argue that if the duty is assigned to every individual, but without consequences for nonperformance, then any person's successful completion of an obligation essentially abrogates the original command by removing the burden from others.¹⁶⁹ These scholars argue that abrogation is only valid with a new command and none was issued here so no abrogation can take place and the burden cannot be lifted. In contrast, the other approach obligates everyone in the group simply because they are part of the group (*wa-huwa wujūbuhu 'alā al-jamī' min ḥaythu huwa jamī'*). Of course, Zarkashī takes issue with obligating everyone in a group since presumably some of them will not yet have legal capacity.¹⁷⁰

In addition to a general discussion of who is obligated to perform, jurists also discuss scenarios that would cause an obligatory act to be assigned to specific people. In other words, in some cases where, as a result of certain circumstances, a *kifāya*-duty will be transformed into an *ʿayn*-obligation. There are three primary scenarios contemplated: insufficient number of performers, initiation of performance and re-establishing lapsed performance. Ibn Muflīḥ describes the most common scenario where this transition from

¹⁶⁹ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

¹⁷⁰ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

kifāya to *‘ayn* occurs: if the minimum number of people required to complete a collective duty are the only people available to perform then the collective duty becomes individually obligated upon them.¹⁷¹ The best example of this is when certain individuals possess unique skills necessary to complete a collective duty. For instance, Shīrazī mentions that if there is only one person available to adjudicate a matter or carry out general judicial duties then the obligatory acts become specific to that person such that they can be compelled to perform.¹⁷² Ibn Qudāma (d. 620/1223) shares the same view, arguing that serving as a judge becomes an individual obligation if only one person is able to fulfill the role. He argues that, in this case, the person should be compelled to perform because the alternative is for a collective duty to remain incomplete for the foreseeable future.¹⁷³ He also holds a similar view with regard to “bearing witness,” stating that if only two people are available who can provide written testimony then this collective duty becomes an individual obligation for them.¹⁷⁴ Shīrazī and Jaṣṣāṣ provide

¹⁷¹ ‘Abd Allāh Muḥammad Ibn Mufliḥ, *al-Ādāb al-sharī‘iyya*, vol. 3, eds. Shu‘ayb al-Arnuxwat and ‘Umar al-Qayyām (Beirut: Mu’assasah al-Risālah, 1999), 525.

¹⁷² Abū Ishāq al-Shīrāzī, *al-Muḥadhdhab fī fiqh al-Imām al-Shāfi‘ī*, vol. 2 (Beirut: Dār al-Kutub al-‘Ilmiyya, 1995), 376. Shīrazī recognizes two different opinions on this matter. The first says that you cannot force someone to be a judge because then you would be making the obligation *‘ayn* as opposed to *kifāya*. The second opinion says that you should force him, even if it then is an *‘ayn* obligation, because, without this person adjudicating, people’s rights would be lost (*bi la qāḍin waḍā‘at al-huqūq*). Ibid., 377.

¹⁷³ Ibn Qudāma al-Maqdisī, *al-Kāfi fī fiqh Ibn Ḥanbal*, vol. 6, ed. ‘Abd Allah b. ‘Abd al-Muhsin al-Turkī (Giza: Dār al-Hajr, 1997), 83.

¹⁷⁴ Ibn Qudāma, *al-Kāfi*, vol. 6, 189.

the same reasoning for the collective duty of “giving written testimony” becoming individually obligated: if only one person in a locality is capable of performing the duty then it becomes assigned to them specifically.¹⁷⁵

However, aside from situations where so few potential performers exist that only one person is able to perform, jurists also contemplate other scenarios where this transition from *kifāya* to *‘ayn* occurs. For instance, jurists consider a person individually responsible for a duty if they commence performance of it. Initiating performance transforms an obligatory act from a collective duty to an individual obligation for the “initiator” while preserving it as a collective duty for everyone else. This is apparently an opinion shared by some of the Prophet’s Companions, particularly in relation to the *jihād* duty.¹⁷⁶ Qarāfī raises this issue in the context of a statement he narrates from the author of the book *al-Ṭirāz*: Sanad b. ‘Anān b. Ibrāhīm al-Azdī.¹⁷⁷ Azdī reportedly said that the actions of a non-obligated person who accompanies fighters (*mujāhidīn*) onto the battlefield will receive the recompense of an obligatory (*farḍ*) act, as opposed to the lesser reward of a supererogatory act, even though they are technically not obligated (*wājib*) to

¹⁷⁵ Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, vol. 2, ed. M. al-Ṣādiq Qamḥāwī (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1996), 256; Shīrāzī, *Tanbīh*, 161; see also, Shīrāzī, *Muḥadhdhab*, vol. 2, 435.

¹⁷⁶ Ghazālī, *al-Wasīṭ*, vol. 7, 7.

¹⁷⁷ According to the editor’s note this is Sanad b. ‘Anān b. Ibrāhīm al-Azdī, a jurist who started to write, but never completed, a commentary on the *Mudawana* which was entitled *al-Ṭirāz*.

perform.¹⁷⁸ Ghazālī relates that Qaffāl al-Shāshī, and others, reject enhancing every obligatory act from collective duty to individual obligation simply based on initiation of performance. Shāshī notes that factors arising in one type of obligatory act may not be replicated in others. As a result, circumstances might make initiating performance in the *jihād* context sufficient to transform the duty from *kifāya* to *‘ayn*, but would fail to do the same in the context of funeral prayers.¹⁷⁹

Another case where jurists transfer the requirement to perform from the collective to the individual is where an obligatory act has ceased to be performed. Ghazālī states that for certain collective duties, like “pursuing knowledge,” if the obligatory act is no longer performed in a particular locality then three scenarios, involving different levels of culpability, are instructive with regard to performance. The first is when an individual knows that the collective duty is no longer being performed and himself has the capacity to perform.¹⁸⁰ This individual is held liable for failing to perform. The second scenario is where an individual does not know performance of the obligation has been suspended, but their proximity to where performance was taking place triggered a duty to investigate, which they failed to undertake. In other words, they did not know but

¹⁷⁸ Qarāfī, *Furūq*, 235.

¹⁷⁹ Ghazālī, *al-Wasīṭ*, vol. 7, 11.

¹⁸⁰ Ghazālī, *al-Wasīṭ*, vol. 7, 7.

should have known.¹⁸¹ The individual here is also liable for failing to perform. The final scenario is where there is no knowledge that performance of the duty has been suspended nor are they in close enough proximity to reasonably be expected to investigate. In this situation, the individual is not liable.¹⁸²

A final situation discussed by jurists is how to consider the performance of a collective duty after it has already been performed by another group. Ghazālī suggests that it all depends on context. As an example, in the *jihād* context, “who” is obligated depends on how the conflict arose and the potential obligor’s proximity to it. Thus, if there is a sudden attack, catching a town unprepared for the onslaught, then every person in that town is burdened with the duty to defend it including those who are sick, slaves and women.¹⁸³ It becomes an individual obligation for all of them. As for individuals who reside outside the town under attack, their level of responsibility varies depending on their distance from the town. In addition, it also matters whether their services are necessary for the town to contribute the sufficient number of volunteers for the duty to be adequately completed. If the town’s own forces are insufficient for

¹⁸¹ Ghazālī, *al-Wasīṭ*, vol. 7, 7.

¹⁸² Ghazālī, *al-Wasīṭ*, vol. 7, 7.

¹⁸³ Ghazālī, *al-Wasīṭ*, vol. 7, 12. Other jurists also support this opinion. See, Nawawī, *Rawḍa al-Ṭālibīn*, vol. 7, 416.

countering the enemy then the next town over is required to help meet the sufficiency requirements for defense.¹⁸⁴

When is the Legal Duty Suspended?

In addition to when performance must take place and who should carry it out, scholars also discuss when an obligatory act is suspended and what factor(s) cause this. They posit two explanations for what causes an obligatory act to be suspended: either it has been performed or the underlying reason (*‘illa*) for the duty no longer exists. This distinction is captured well by Qarāfi’s exchange with a hypothetical interlocutor. His interlocutor challenges the notion that a nonperforming individual can have their duty removed by proxy, in other words, by someone else’s performance. In particular, the interlocutor makes a distinction between physical and non-physical duties, stating that collective duties fulfilled through physical acts (*al-fi’l al-badani*) must follow the general rule that no individual can fulfill physical acts for another.¹⁸⁵ Thus, it is invalid to classify any duty involving physical acts as *kifāya* because these duties cannot be satisfied by proxy. In response, Qarāfi takes issue with how his interlocutor is understanding the

¹⁸⁴ Ghazālī, *al-Wasīṭ*, vol. 7, 12.

¹⁸⁵ Qarāfi, *Furūq*, 235.

performance of these obligatory acts. In his opinion, these duties are not fulfilled as a result of the actions of a proxy, but rather the obligatory act is suspended due to the absence of an “underlying purpose for the obligation” (*ḥikmat al-wujūb*). Qarāfī illustrates this point with the collective duty to rescue a drowning person. The duty to save someone who is drowning no longer exists after that person is rescued because the rationale for the obligation (i.e. saving a life) is no longer present once the person has been saved. The underlying reason for saving the drowning person is to preserve their life and since that has been accomplished no further performance is required.¹⁸⁶

Zarkashī supports the view that for a duty to be complete, other than having it abrogated by an additional command, the underlying reason for the duty (*‘illat al-wujūb*) must no longer exist. He illustrates his thinking by pointing to the funeral prayer context.¹⁸⁷ Zarkashī claims that “God obligates funeral prayer in order to pay respects to the dead” (*innamā awjaba ṣalāt al-janāza ihtirāman li-l-mayt*), just as God obligates the rituals around burial as a way to, among other things, appropriately cover the body.¹⁸⁸ Thus, the underlying reason for performing funeral prayers is respecting the dead and the reason for burial is to cover the body. As a result, if some people carry out these

¹⁸⁶ Qarāfī, *Furūq*, 235.

¹⁸⁷ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

¹⁸⁸ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

obligatory acts, then no one else is required to do so because these underlying reasons will have been accomplished. Similarly, the duty to bury someone no longer exists if the dead body has been burned or eaten by a wild animal. In both cases, the reasoning behind the “duty to shroud a corpse” ceases to exist when the body is no longer present. In turn, if no reason for the duty remains, then the duty itself ends.¹⁸⁹ Addressing the issue of whether an obligatory act is suspended due to someone’s performance versus the absence of an underlying reason, Zarkashī notes that when performance, as opposed to other extenuating circumstances, causes the underlying reason to disappear then it is reasonable to frame the duty as having been removed due to performance.¹⁹⁰ He notes that a duty can sometimes be removed by performance and other times because circumstances make performance impossible.¹⁹¹

Another consideration raised in the *kifāya* literature is the level of certainty necessary to determine whether an obligatory act has been performed sufficiently enough that its burden is lifted. Many scholars note that simply the *belief* that a duty has been performed, not its *actual* performance, is adequate to remove the burden of the duty. In other words, the probable (*ẓann*) performance of an obligatory act is sufficient

¹⁸⁹ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

¹⁹⁰ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

¹⁹¹ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 244.

to remove its burden and it is unnecessary to be absolutely certain that the duty was completed. For instance, Nawawī holds that as long as one receives word of someone else performing the collective duty then the burden is removed and there is no requirement to investigate further. In addition, if a group performs an obligatory act unaware that it has already been performed, their actions still count as though they fulfilled a collective duty.¹⁹² Qarāfī also considers a *kifāya* command satisfied simply if one “believes” that performance took place, regardless of whether this belief is confirmed to be true. Hence, if Group X thinks it is probable that Group Y performed an obligatory act, then the duty is suspended for Group X. Likewise, in the same scenario, if Group Y believes Group X has performed the duty, then the duty is suspended for Group Y.¹⁹³ Thus, theoretically, both Group X and Y can fail to perform an obligatory act without incurring any liability simply by operating under the sincere assumption that the other has performed and thus the duty has been suspended.¹⁹⁴ Qarāfī also believes there is no penalty for a particular group if they assume another group performed the duty since they are satisfying a shared responsibility.¹⁹⁵ Rāzī phrases the same idea slightly differently. He believes that the

¹⁹² Nawawī commentary in *Shīrāzī, Tanbīh*, 19-20.

¹⁹³ Qarāfī, *Furūq*, 234-235.

¹⁹⁴ Qarāfī, *Furūq*, 235.

¹⁹⁵ Qarāfī, *al-Dhakhira*, vol. 1, 82.

burden of a *kifāya*-duty is suspended due to a “preponderant belief” (*al-ẓann al-ghālib*) that the duty has been completed. The result is the same: if one group believes that another has completed the duty, its burden is removed. Similarly, within a group, if every member thinks someone else has performed the obligatory act, then it is satisfied regardless of whether it has actually been performed. However, Rāzī makes clear that the opposite also holds true: if a group (or group member) believes that no one else has fulfilled an obligatory act then they remain obligated, even if the duty has actually already been completed.¹⁹⁶ Rāzī’s core point, shared by other scholars, is that since it is often not possible to know with certainty whether an act has been performed it is more reasonable to expect people to act on the basis of the probable information they possess.¹⁹⁷

Liability

Having discussed the particulars of when an obligation is triggered, who bears legal responsibility and when that responsibility ends, we turn to a consideration of liability, both individual and collective, for failing to perform. First, as mentioned above,

¹⁹⁶ Rāzī, *Maḥsūl*, vol. 2, 186.

¹⁹⁷ Rāzī, *Maḥsūl*, vol. 2, 186.

liability attaches if certain circumstances transform a collective duty into an individual obligation for a specific person(s) and they subsequently fail to perform. In essence, this is liability for failing to perform a quasi-individual obligation. Second, if an entire community either collectively decides to forgo a duty or none of its members step forward to perform then all members are held liable.

To this point, Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) says that if people collectively decide to forgo the fulfillment of a duty then they are all liable.¹⁹⁸ Nawawī echoes the same sentiment, but extends it beyond purposefully omitting performance to a lower level of culpability which penalizes collective failure to perform regardless of whether it was purposeful or not. He states that a failure to perform the *kifāya* duty results in everyone being liable until someone satisfies the obligation and removes liability.¹⁹⁹ Āmidī goes so far as to suggest that there is a scholarly consensus (*ijmāʿ*) that everyone should be penalized if they collectively agree not to perform a duty.²⁰⁰ Qarāfī requires an additional step before penalizing the collective: if they conspire to forgo the

¹⁹⁸ Shaybānī, *Kitāb al-Kasb*, 72.

¹⁹⁹ Nawawī, *Tahrīr al-fāz al-tanbīh*, vol. 1, ed. ʿAbd al-Ghanī al-Daqqar (Damascus: Dār al-Qalam, 1987), 51.

²⁰⁰ Āmidī, *Iḥkām*, vol. 1, 137.

duty and then fail to meet their shared responsibility.²⁰¹ In other words, Qarāfī seems to require that the conspiracy be put into practice before it is considered liable behavior.

Zarkashī comments extensively on this issue and supports the idea that in a situation where a group collectively decides to forgo a duty everyone has transgressed (*athimū*). In fact, he considers a group that suspends (*taʿtīl*) a *kifāya* to be just as blameworthy as an individual that forgoes an *ʿayn* obligation.²⁰² Furthermore, Zarkashī argues that those who collectively agree to neglect the collective duty should have compliance forced on them even if that means taking up arms against them (*law ittafaqu ʿalā tark al-farḍ kifāyatan qūtilū*).²⁰³ He mentions that Juwaynī presents an apt analogy to this situation in his *Kitāb al-talkhīṣ fī uṣūl al-fiqh* (“Brief Source in Legal Theory”). Juwaynī discusses a person who owes a thousand dirhams and, along with his guarantor, decides to default on repayment. Both debtor and guarantor would be considered in violation of their duty to repay the debt.²⁰⁴ Hence, the relevant lesson/analogy for the *kifāya* context is that although an individual might be responsible for performing the collective duty,

²⁰¹ Qarāfī, *al-Dhakhira*, vol. 1, 82.

²⁰² Zarkashī, *al-Bahr al-muhīt*, vol. 1, 246.

²⁰³ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 246.

²⁰⁴ Zarkashī, *al-Bahr al-muhīt*, vol. 1, 246.

everyone else in the community is a guarantor of that performance. Thus, when no one performs they are all liable.

Qarāfī raises an interesting critique of holding someone liable for initiating performance of an obligatory act they had no duty to perform. His hypothetical interlocutor notes it odd that a person's actions can be considered obligatory once initiated but their subsequent nonperformance will not result in any penalty. For instance, if someone is not obligated to take up arms, but does so and then gets separated from the war party, they are not penalized at that point for returning home even though presumably the warring party has now come to rely on their performance. For the interlocutor, this disrupts the entire definition of "duty": an act whose omission is punishable.²⁰⁵ If someone initiates performance of an act and their actions are classified as the performance of a duty then any subsequent nonperformance should carry liability. Qarāfī recognizes this difficulty and responds by arguing that the duty is conditioned on the performance of the group as a whole, not individuals within the group. In other words, the question of penalty only arises if everyone forgoes performance not on the basis of one person performing (or not).²⁰⁶ Hence, the rule is that the duty depends on a

²⁰⁵ Qarāfī, *Furūq*, 236.

²⁰⁶ Qarāfī, *Furūq*, 236.

condition and is nullified by the absence of that condition (*anna al-wujūb al-mashrūt bi-sharṭin yantaḥi ‘inda intifā’ dhālika al-sharṭ*).²⁰⁷ Thus, if the person is separated from the group then the condition that obligated the person in the first place (i.e. leaving with the war party) is no longer present and the duty no longer operative. For Qarāfī, it is not odd that an obligatory act would be contingent on how connected or separated it is from a situation.²⁰⁸ He cites the hypothetical of Zayd and his wife. If Zayd is married and living with his wife such that intimacy is possible then he is duty-bound to support her. However, if he has formally separated from her such that intimacy is not possible, then he doesn’t have the same duties unless he returns to her and ends the separation.²⁰⁹ For Qarāfī the same logic of proximity applies to the *jihād* context: if an unobligated person joins people leaving for *jihād* then he is obligated to fight, but if he separates from them then the duty no longer exists.²¹⁰

One final issue that is raised by Qarāfī in his exchange with a hypothetical interlocutor is this: if an obligation has been decreed for every group, how can it be suspended for nonperformers as a consequence of other people performing (*kayf saqaṭa*

²⁰⁷ Qarāfī, *Furūq*, 236.

²⁰⁸ Qarāfī, *Furūq*, 236.

²⁰⁹ Qarāfī, *Furūq*, 236.

²¹⁰ Qarāfī, *Furūq*, 236.

‘an man lam yaʿal bi-fiʿl ghayrihi)? In particular, in the context of *kifāya*-duties that are physical acts (*al-fiʿl al-badaniyy*), how do we contend with the rule for physical acts that says the act of one person cannot be of use to another? How can the law equate the one who acts with the one who does not act (*kayf sawwā al-sharʿ bayna man faʿala wa-man lam yaʿal*)?²¹¹ Qarāfī seems to be alluding to the issue that arises in Q 4/al-Nisāʾ:95 where both those who stay and those who go off to fight are “promised a good reward” (*wa-kullan waʿada Allāh al-ḥusnā*). Qarāfī addresses this issue by first noting that the duty is not suspended as the result of the substitution of someone’s performance (*niyābat al-ghayr*) for another’s nonperformance. Rather, it is because the underlying reason (*ḥikma*) is no longer present. Furthermore, the scenario in which performance and nonperformance are “equal” is not equality in the sense of reward (*thawāb*), but rather they are simply equal in the sense that the obligation has been suspended for both of them. The performer is entitled to a reward while the nonperformer is not.²¹²

As mentioned earlier, one final area that does not seem to receive any treatment in the literature is the sanction, if any, that should be given when there is a failure to perform. Discussion of sanction is largely absent from the discussion, either on collective

²¹¹ Qarāfī, *Furūq*, 235.

²¹² Qarāfī, *Furūq*, 235. Interestingly, if the nonperformer intended to perform then he is eligible for a reward. Ibid.

duties generally or in the sections discussing specific collective duties. To some degree this is indicative of the general disposition in Islamic legal literature that disfavors punishment, but it also demonstrates the fact that, like many individual obligations, state enforcement is not expected or of primary importance. For most collective duties this does not present much of an issue since performance and nonperformance are related to divine reward and punishment in the afterlife. Hence, nonperformance generally does not entail civil or criminal sanction. One might presume that, similar to the individual obligation to pay zakat, some basic notion of enforcement and accountability would be present. However, despite historical accounts of enforcing the payment of zakat (i.e. the *ridda* wars), legal discussions on zakat rarely mention enforcement. Moreover, even collective duties that fall under the state's authority, such as *jihād*, make no mention of punitive measures for failure to comply. At most, the jurists will use the term "sinful" (*ithm*) to describe liability for failing to carry out a duty, indicating that a penalty will be imposed in the "afterlife."

Concluding Thoughts

As the above discussion shows, the *kifāya* doctrine developed significantly after its initial articulation in the 9th century. The main discourse on *kifāya* is found in the

discussions on substantive law where jurists craft legal rules for acts classified as collective duties. As a result, *kifāya* discussions center on how it functions with regard to a specific obligatory act and broad, theoretical discussions on the idea of a *kifāya*-duty, let alone a *kifāya* doctrine, are far less common. However, it is in these less common theoretical discussions where the contours of the doctrine seem to be found, especially with jurists writing in the 12th century CE and later. The questions central to these theoretical discussions are understanding the relationship between *kifāya* and *ʿayn*, particularly from the standpoint of prioritizing one over the other; as well as, determining who is obligated to perform and when that duty is suspended. While there is uniformity in the core ideas behind the *kifāya* duty, there are also points of disagreement.

Another interesting element of the discussions relating to collective obligations is the manner in which jurists create a category of duties that they are uniquely qualified for. This is most evident with the collective duty to acquire knowledge. Shāfiʿī notes that the general public is “incapable” of attaining certain types of knowledge and that such knowledge is even beyond the grasp of some specialists. Hence, he suggests that it is the province of an elite group within society that is capable of acquiring this specialized

knowledge and they are required to do so.²¹³ Despite restricting the duty to a subset of the larger collective, he applies the same basic rule: if some members of the elite group obtain this knowledge then other members of the elite are relieved from the duty, bearing in mind that those who actually undertake the pursuit receive a greater reward.²¹⁴ Elsewhere, Shāfi‘ī creates this elite category again by dividing Prophetic reports into two sets: one for general consumption and another for those capable of interpreting them.²¹⁵

One might assume that one of the reasons jurists want to craft a special category for themselves and the duties they perform is because they were exempt from answering the governing authority’s call for individuals to satisfy the collective duty of *jihād*. Furthermore, making these laws subject to the scholarship duty made them both pious and elite. There seems to be a similar division of the community with regard to the verse Q 3/al-‘Imrān:104 which carries an instruction to command what is right and forbid wrong actions. Michael Cook notes that the common view on this verse restricted the duty to a specific qualified elite and that many commentators felt a requisite amount of

²¹³ Shāfi‘ī, *al-Risāla*, 358-360.

²¹⁴ Shāfi‘ī, *al-Risāla*, 360.

²¹⁵ Shāfi‘ī, *al-Umm*, vol. 10 (*Ikhtilāf al-Ḥadīth*), ed. Rif‘at Fawzī ‘Abd al-Muṭṭalib (al-Manṣūra: Dār al-Wafā’ li’l-Tibā‘ wa-l-Nashr wa-l-Tawzī‘, 2005), 7.

knowledge was needed to fulfill the duty.²¹⁶ For instance, Abū ʿl-Layth al-Samarqandī (d. 373/983), a Ḥanafī, says that the ḥadīth that commands you to prevent a wrong with your hand, tongue or heart is first for rulers and scholars and then for the rest of society.²¹⁷ This relationship between legal responsibility, authority and collective duties is a consistent theme, as will be shown in the next chapter on *jihād*.

²¹⁶ Cook, *Commanding Right*, 18-19.

²¹⁷ Cook, *Commanding Right*, 312. Cook notes that the Ḥanafīs see the duty of *amr/nahy* through very hierarchical conception of society. Ibid., 318.

CHAPTER TWO: THE DUTY TO FIGHT

Introduction

Chapter One explored the medieval doctrine and theory that developed around *kifāya*-duties as a way of explaining the variety of acts that jurists include in this category. Arguably the most important act that was categorized as a *kifāya*-duty was *jihād*, specifically with the meaning of engaging in warfare. As one scholar has noted, the rapid expansion of Islam is at least partly credited to the fact that the Muslim “conviction to ‘strive’ for God to make their belief manifest by carrying out jihad was so strong; it seems to have been as intrinsic to belief as any other religious duty.”²¹⁸ This duty to fight or *jihād*-duty was especially prominent because jurists believed it had explicit textual support from the Qur’ān. In this sense then, the *jihād* duty is unique because it becomes the basis upon which the entire category of *kifāya*-duties is constructed. There are various verses in the Qur’ān that deal with *jihād*, but jurists consider two of them as commenting directly on the collective nature of the obligatory act; these verses become the core proof-texts for *farḍ kifāya* as a whole.²¹⁹ The first verse is Q 4/al-Nisā’:95:

²¹⁸ Chase Robinson, “Conclusion: From Formative Islam to Classical Islam,” in *The New Cambridge History of Islam, Vol 1: The Formation of the Islamic World, Sixth to Eleventh Centuries*, ed. Chase F. Robinson (Cambridge: Cambridge University Press, 2011): 686.

²¹⁹ Unless otherwise noted, all translations of the Qur’ān are from the translation by M.A.S. Abdel Haleem. There are several verses in the Qur’ān pertaining to *jihād*. Among them are Q 2/al-Baqara:193 {fight them

Those believers who stay at home (*al-qā'idūn*), apart from those with an incapacity, are not equal (*lā yastawī*) to those who commit themselves and their possessions to striving in God's way (*al-mujāhidūn fī sabīl Allāh*). God has raised such people to a rank above those who stay at home– although He has promised all believers a good reward (*wa-kullan wa'ada Allāh al-ḥusnā*), those who strive are favoured with a tremendous reward above those who stay at home.

The verse discusses two sets of people in the context of military engagement:

those who fight and those who stay behind. Both parties are viewed favorably simply because they are believers and so will receive some reward. However, the text makes clear that those who join the fight are entitled to greater recompense for this act.

Similarly, the second verse, Q 9/al-Tawba:122, states:

Yet it is not right for all the believers to go out [to battle] together (*li-yanfirū kāffatan*): out of each community, a group should go out to gain understanding of the religion (*li-yatafaqqahū fī al-dīn*), so that they can teach their people when they return (*li-yundhirū qawmahum idhā raja'ū ilayhim*) and so that they can guard themselves against evil.

until there is no more chaos and religion is for God}; Q 9/al-Tawba:14 says {fight them and God will punish them by your hands and cover them with shame}; Q 9/al-Tawba:29 {fight those who do not believe in God and the Last Day}; Q 47/Muḥammad:35 {be not weary and faint-hearted, crying for peace, when you should be uppermost because God is with you}; Q 9/al-Tawba:5 {fight the disbelievers wherever you find them}; Q 9/al-Tawba:36 {fight the disbelievers all together as they fight you all together}; Q 9/al-Tawba:41 {go forth lightly or heavily and strive with your wealth and yourselves in the way of God}; Q 9/al-Tawba:39 {unless you go forth, He will punish you with a grievous penalty and put others in your place}; Q 4/al-Nisā':71 {go forth in parties or go forth all together} and Q 61/al-Şaff:10-11 {O you who believe! Shall I lead you to a bargain that will save you from a grievous penalty? That you believe in God and His messenger and that you strive your utmost in the cause of God, with your property and your persons}.

Here, a third group emerges that is a subcategory of those who stay behind: people who stay behind with a purpose.²²⁰ The purpose is two-fold: to acquire greater understanding of Islam and then to transmit that understanding to others, specifically those who return from battle. In other words, not only is there no requirement for everyone to join the fight, but it is discouraged. Additionally, the verse signals in two ways that those who stay behind with this purpose have a different station than those who stay behind with no purpose. First, it suggests that these people pursuing knowledge will become the “teachers” of those who have gone off to fight, a comparatively elevated status. Second, unlike the earlier verse Q 4/al-Nisā’:95, there is no mention here of those fighting receiving a greater reward in comparison to those staying behind with a purpose.

Building on this scriptural background, as noted, the earliest juristic articulation of the category of *kifāya*-duties seems to be by Shāfi‘ī and develops out of particular reference to matters relating to performing *jihād*, for instance, *ju‘l* (substituting someone in your place to perform *jihād*) and *takhalluf* (failing to participate in the *jihād* duty).²²¹ In general, jurists’ discussions of *jihād* create a distinction between *kifāya*-duties and ‘ayn-

²²⁰ Shāfi‘ī also uses this verse out-of-context to suggest that it is referring to women being exempt from the duty: *arāda bihi al-dhukūr dūn al-ināth*. Shāfi‘ī, *al-Umm*, vol. 5, 368.

²²¹ Bonner, “Ja‘ā’il and Holy War in Early Islam,” 46.

obligations based on “who” is required to fulfill the obligatory act. An *‘ayn*-obligation (*farḍ ‘ayn*) assigns the duty to one person and only that person’s performance can satisfy the obligation; no one else is eligible to fight on his/her behalf. On the other hand, if *jihād* is classified as a *kifāya*-duty then a larger set of people is eligible to fight on behalf of everyone else. For some acts, only one person is required to satisfy the duty, while in other cases, like the *jihād* duty, performance is generally mandated for more than one person. As long as those selected to fight perform the duty’s requirements, it is satisfied for everyone else. However, if any of them fail to perform, and the minimum number of performers is not met, then liability for the failure to fight falls on everyone. Hence, performers and nonperformers receive both the accolades and blame for fulfillment and omission of these duties.

Some have linked the development of a “classical theory” around *farḍ kifāya* directly with Shāfi‘ī attempting to address the “problem of finding enough men to fight on the frontiers while preserving a role in all of this for constituted authority, the *sulṭān*.”²²² Only the ruler, or his designees, had the ability to preemptively declare *jihād*

²²² Michael Bonner, “Some Observations Concerning the Early Development of Jihad on the Arab-Byzantine Frontier,” *Studia Islamica*, No. 75 (1992), 28. In fact, Bonner contends that the *kifāya* theory was “not yet available” for authors of specific books on *jihād*, like Abū Ishāq al-Fazārī and ‘Abdallāh b. al-Mubārak. Ibid. Elsewhere he notes that the theory came about in connection with the development of the concept of

when no attack was impending.²²³ Qarāfī notes four reasons that *jihād* is made an obligation: the removal of disbelief (*izālat munkar al-kufr*), enabling a ruler (*imām*) to designate forces to a task, the requirement to defend one's land when under attack and in order to rescue prisoners of war (*istinqādh al-asrā*).²²⁴ During the Prophet's lifetime, and for at least a century afterwards, there was no professional, standing army. As a result, governing authorities needed to rely on voluntary forces to pursue defensive or offensive military campaigns. *Jihād* as a *kifāya*-duty contained not only a religious incentive for people to come forward to fight, but allowed the burden of the duty to be shared. Furthermore, since in its most basic form the duty was triggered by a state's request for fighters, *jihād* as a *kifāya*-duty also promoted the state's oversight over military affairs. In theory, this oversight allowed the state to regulate the overall size of the fighting force to be deployed in any given situation, the number of soldiers each locality needed to contribute to fulfill their obligation and which particular localities it wished to draw troops from.

"*ummah*," as "military service became increasingly understood as pertaining to one's status as a Muslim." Bonner, "Ja'ā'il and Holy War in Early Islam," 46.

²²³ Unlike in the medieval Christian context where Urban II eventually "took the prerogative for declaring holy war away from emperors and kings," leaving it for individuals and the Church, it is only in recent decades that there has been a widespread disintegration of the state's role in waging *jihād*. Michael Bonner, *Aristocratic Violence and Holy War: Studies in the Jihad and the Arab-Byzantine Frontier* (New Haven: American Oriental Society, 1996), 3.

²²⁴ Qarāfī, *al-Dhakhira*, vol. 3, 387-89.

This highlights another unique aspect of the *jihād*-duty: the state's active role in its implementation. Even though the *jihād*-duty is the initiator of the *kifāya* category, in virtually all other *kifāya*-duties the state is absent.²²⁵ While *kifāya*-duties contain both a spiritual and practical dimension, the discourse generally centers on what an individual's responsibilities (or rights) are in relation to a particular duty. For *jihād*, individual responsibility is discussed, but jurists also endeavor to center the state in the practical performance of the duty. This is especially because the *jihād*-duty is used to protect and expand the state's territory; *jihād* functioned as the central mechanism through which the Muslim polity exerted its authority and maintained its legitimacy. Moreover, this feature of the *jihād*-duty, in which the state figures prominently, forced jurists to navigate the tensions that arise when the state is able to exercise authority over individual religious obligations. Put differently, jurists struggle with the idea of endowing the *jihād*-duty with spiritual significance if it is always going to be in the ambit of the state's authority. There must be circumstances in which the individual is able to

²²⁵ Specifically, the state determines the number of individuals necessary to satisfy the duty since it triggered the *kifāya*-duty in the first place. However, two important points need to be kept in mind here. First, while *jihād* is the main *kifāya*-duty where jurists articulate a prominent role for the state, it is not the only duty where the state is present. For instance, as we will discuss later, the state also has a role in certain circumstances relative to the caretaking of foundlings. In addition, the adjudication of cases is also considered a *kifāya*-duty and the state has a role in selecting judges for this. Second, it is important to note that the state triggers the *jihād*-duty when it is *kifāya*, but in those "defensive" circumstances where it is an 'ayn-obligation there is an automatic trigger from the actions of the hostile party.

override the state's control over the *jihād*-duty and its monopoly on violence. The precise occasions when this occurs underlie jurists' construction of the overall framework for the duty to fight.

Definitions

The Scriptural Meaning of Jihād

The lexicographer Ibn Manẓūr (d. 711/1311) explains that the basic meaning of the Arabic term *jihād* is to struggle against something or exert effort towards an objective.²²⁶ Many scholars also acknowledge a “non-violent” element to the definition of *jihād*, specifically the struggle against one's own desires or “lower soul” (*nafs*).²²⁷

²²⁶ Ibn Manẓūr, *Lisān al-‘Arab*, vol. 3 (Beirut: Dār Ṣādir, 1990), 135 (j-h-d).

²²⁷ The dichotomy between a violent and non-violent *jihād* is characterized in the literature as between a “greater jihad” (*al-jihād al-akbar*) and “lesser jihad” (*al-jihād al-aṣghar*). Modern jurists have tried to connect this greater *jihād* with a “personal moral struggle,” even suggesting it divides into a “*jihād* against the self” and a “*jihād* against the devil.” Ahmed al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave MacMillan, 2011), 76. However, this idea of greater jihad was “often rejected by many in Islam's mainstream ‘orthodoxy’ from the late medieval period onwards” and seems to have been popular primarily in Sufi circles. Gavin Picken, “The Greater Jihad in Classical Islam,” in *Twenty-First Century Jihad: Law, Society and Military Action*, eds. Elisabeth Kendall and Ewan Stein, 126-138. (New York: I.B. Tauris, 2015), 126. Some recent scholarship has tried to argue, with mixed results, that *jihād* originally did not have as prominent a militaristic sense as it does now and that due to sociopolitical circumstances the term's meaning, as found in the Qur'ān, ḥadīth and exegetical literature, was actually narrowed as compared to its original meaning. See generally, Asma Afsarruddin, *Striving in the Path of God: Jihād and Martyrdom in Islamic Thought* (New York: Oxford University Press, 2013). Reuven Firestone posits a slightly different argument, suggesting that the “early ban on fighting” was not necessarily a “protective tactic” to avoid the smaller and weaker Muslim community from being destroyed, as the tradition has explained, but is “just as likely” a “nonmilitant view” calling for “verbal argument without physical aggression” that was “lost to history.”

However, generally speaking, and for our purposes here, in the legal literature *jihād* has meant an “armed struggle against unbelievers” and connects back to historical battles fought by Islam’s prophet, Muḥammad.²²⁸ Hence, very early on the *qitāl* (“fighting”) component of *jihād* figured prominently as a specific manifestation of the larger concept of “struggle.” The Qur’ānic text seems to support this implication that fighting was an essential component of *jihād*’s definition with “numerous” verses on warring, “spread out over more than a dozen chapters.”²²⁹ For many scholars, the first verse that allowed Muslims to engage in fighting was Q 22/al-Ḥajj: 39.²³⁰ Broadly speaking, the *jihād* verses outline the conditions in which fighting becomes necessary, as well as the limits of “justified military combat,” all of which become the basis for juristic reflection over centuries of Islamic legal thinking.²³¹

Reuven Firestone, *Jihad: The Origin of Holy War in Islam* (New York: Oxford University Press, 1999), 54. Bearing all this in mind, for our purposes here, the only *jihād* under consideration is that of engaging in armed struggle.

²²⁸ Rudolph Peters, *Jihād in Classical and Modern Islam: A Reader* (Princeton: Markus Wiener Publishers, 1996), 1. As Suleiman Mourad and James E. Lindsay note, “in a specifically religious context, and as understood and articulated by almost every Muslim religious scholar past and present, including Ibn Manẓūr, *jihād* has one meaning: to exert one’s effort in fighting the enemies of God by acts or by words.” Suleiman A. Mourad and James E. Lindsay, *The Intensification and Reorientation of Sunni Jihad Ideology in the Crusader Period* (Leiden: Brill, 2013), 16.

²²⁹ Firestone, *Jihad*, 47.

²³⁰ Firestone, *Jihad*, 54.

²³¹ Afsaruddin, *Striving*, 34.

One challenge that arises is the instructions on *jihād* propose different approaches to fighting, moving between levels of aggression, and even offering seemingly conflicting guidance. Rueven Firestone suggests that juristic writing on *jihād* was consumed by the “seeming contradiction” in the *jihād* verses and jurists subsequently came to espouse an “evolutionary theory” of war as an explanation.²³² In this theory, “incremental escalation in militancy” corresponds with “incremental growth and development of the religious community,” such that “divine authority for total war” is withheld from Muslims until they acquire the capacity and organization to undertake it.²³³ Hence, Muslim scholars concluded that “scriptural verses regarding war were revealed in direct relation to the historic needs of Muḥammad during his prophetic mission.”²³⁴ The theory might also be framed as a pragmatic one, advocating for a less aggressive posture when the community’s capabilities (and size) made it a less effective fighting force against any opponent. The need to reconcile seemingly contradictory verses on *jihād* was partly due to the “atomistic approach” traditional exegetes took to scriptural interpretation: they often focused on a verse in isolation and used information external to the Qur’ān as the primary means of interpretation. In addition, the “principle of abrogation” (*naskh*)

²³² Firestone, *Jihad*, 50.

²³³ Firestone, *Jihad*, 50.

²³⁴ Firestone, *Jihad*, 50.

became an easy method for dealing with two isolated verses that conflict and eventually led to a heavy reliance on *naskh* as an interpretive tool.²³⁵

Firestone notes that the “traditional schema” for the Qurʾān’s commentary on war is divided into four stages: nonconfrontation (e.g. Q 16/al-Naḥl: 125), defensive fighting (e.g. Q 22/al-Ḥajj: 39-40), initiating attacks but with limits (e.g. Q 2/al-Baqara: 194) and unconditional command to fight all unbelievers (e.g. Q 9/al-Tawba: 5).²³⁶ Despite appreciating the logic of the traditional framework, Firestone rejects it.²³⁷ He suggests that the overarching context that produced this schema was likely one where more militant factions within the Muslim community, promoting an aggressive posture, won out over nonmilitant factions in understanding these verses.²³⁸ Firestone offers a different organization of the verses, one he contends is “independent of traditional Muslim assumptions” as far as possible.²³⁹ This organization also divides the Qurʾān’s

²³⁵ Mustansir Mir, “Jihad in Islam,” in *Jihad and Its Times: Dedicated to Andrew Stefan Ehrenkreutz*, eds. Hadia Dajani-Shakeel and Ronald A. Messier (Ann Arbor: University of Michigan, 1991), 115.

²³⁶ Firestone, *Jihad*, 51-60.

²³⁷ Firestone, *Jihad*, 50. Firestone himself is less convinced of this theory considering it the product of an existing policy of empire. Ibid. His basis for rejecting the theory is the fact that it is premised on “occasions of revelation” (*asbāb al-nuzūl*), but he argues this does not align with the disagreement among jurists as to what occasion marked which revelation. Some jurists mention *asbāb* literature to provide context for a verse and in doing so disrupt the chronology that would be necessary for the verse to fit within an evolutionary theory of war. Eventually, Firestone contends, even statements in the Qurʾān that do not appear to refer to war are articulated as “divine pronouncements” on *jihād* by the post-Qurʾānic tradition. Ibid., 47.

²³⁸ Firestone, *Jihad*, 68.

²³⁹ Firestone, *Jihad*, 69.

verses into four parts: nonmilitant verses, verses restricting fighting, those expressing “conflict between God’s command and the reaction of Muḥammad’s followers,” and those “strongly advocating war for God’s religion.”²⁴⁰

In addition to the Qur’ān, the historical precedents set by Muḥammad also inform later legal thinking on *jihād*. The tradition records Muḥammad as having participated in at least twenty-seven military campaigns of his own and deputizing at least fifty-nine

²⁴⁰ Firestone, *Jihad*, 69. Although an analysis of Firestone’s organization of these verses, as well as his critique of the traditional account, is beyond the scope of this project, a few brief comments seem necessary. In general, Firestone’s examination offers many useful insights into the framework that came to dominate the traditional understanding of these *jihād* verses. The excessive reliance on *asbāb al-nuzūl* literature clearly presents complications for scholars that want to advocate for an evolutionary theory, but are challenged by the dating of these occasions of revelation. It would be worthwhile to explore a larger sample of exegetes, even those in later centuries, to get a full sense of the extent of militancy projected back onto the Qur’ān. In particular, exegetes less reliant on *asbāb al-nuzūl* literature in their methodology would be particularly helpful, such as Zamakshārī or Rāzī. It would also be worthwhile to see whether jurists, such as Ibn Ḥazm, who rejected ideas like *naskh*, which was central to the classic doctrine, still espoused the evolutionary theory and on what basis. Some scholars, like Asma Afsarrudin, have begun this work already. With regard to Firestone’s own account, its primary challenge seems to be too atomistic in its approach to the Qur’ān. While Firestone avoids obtaining context through *asbāb* literature, he does not seem to take full account of the context the Qur’ān provides for its own verses. Unfortunately, he operates under the common assumption that the Qur’ān “provides virtually no historical contexts for its own messages” and thus ignores a crucial source of information on these verses: the Qur’ān itself. Firestone, *Jihad*, 70. However, recent scholarship on the Qur’ān presents a different picture, suggesting greater coherence and internal commentary within the text. See, for example, Angelika Neuwirth, *Studien zur Komposition der mekkanischen Suren* (Berlin: Walter de Gruyter, 2007) and “Structural, linguistic and literary features,” in *The Cambridge Companion to the Qur’ān*, ed. Jane Dammen MacAuliffe (Cambridge: Cambridge University Press, 2006); Neal Robinson, *Discovering the Qur’an* (Washington, DC: Georgetown University Press, 2004); Islam Dayeh, “Al-Ḥawāmīm: Intertextuality and Coherence in Meccan Surahs,” in *The Qur’ān in Context: Historical and Literary Investigations into the Qur’ānic Milieu*, eds. Angelika Neuwirth, Nicolai Sinai and Michael Marx (Leiden: Brill, 2010); Mustansir Mir, “Continuity, Context and Coherence in the Qur’ān: A Brief History of the Idea of *Nazm* in the *Tafsir* Literature,” *Al-Bayan*, vol. 11, no. 2 (2013).

others, such that his biographers felt it necessary to have a term referring to this period in his life: *maghāzī* (raids).²⁴¹ Of course, all of this fits in with the larger historical milieu of the time, one that reflected the close relationship between religion and warfare, so that by the end of the fourth century, even the “militant interpretations of the Christian message and mission” had become normative both for Roman policy and Christian communities.²⁴² Hence, Islamic juristic discussions engage Qur’ānic imperatives and Muḥammad’s historical precedent in the above context in order to craft a doctrine on military engagement. Among other things, the doctrine included broad concerns over “a priori reasons for engaging in justified armed conflict” and issues of “humane conduct”

²⁴¹ Mourad and Lindsay, *Sunni Jihad Ideology*, 18. The term *maghāzī* and its translation as “raids” can be somewhat misleading. As one scholar notes, the word “invokes the discrete locations of key battles and raids conducted by the Prophet and his followers, yet it also invokes a more metaphorical meaning...*Maghāzī* are also sites of sacred memory; the sum of all events worthy of recounting.” Sean W. Anthony, “Introduction,” in Maʿmar ibn Rāshid, *The Expeditions: An early Biography of Muḥammad*, trans. Sean W. Anthony (New York: New York University Press, 2014), xix-xx. It should also be noted that despite biographers having a special term for this period of the Prophet’s life, in general the *sīra* literature says very little about “military methods and technology.” John W. Jandora, “Archers of Islam: A Search for ‘Lost’ History,” *The Medieval History Journal*, vol. 13, no. 1 (2010): 98.

²⁴² Thomas Sizgorich, *Violence and Belief in Late Antiquity: Militant Devotion in Christianity and Islam* (Philadelphia, University of Pennsylvania Press, 2009), 5. As some scholars have noted, Constantine’s evocation of the “symbol of Christ in his military drive to seize Rome” was one of the acts that fixated a Christian holy war conception in late antiquity, that eventually “morphed into the high medieval crusade.” Philip Buc, *Holy War, Martyrdom and Terror: Christianity, Violence and the West* (Philadelphia: University of Pennsylvania Press, 2015), 25. The one major difference in the crusader period was that, unlike late antique holy war, they involved “ordinary believers, massively, both as combatants and as economic and spiritual supporters,” very similar to roles played in *jihād*. Ibid.

during armed conflict.²⁴³ Part of this discussion, and the central concern of this chapter, is what these discussions have to say about the legal duty of *jihād*, what it exactly entailed, who was obliged to participate, what limitations existed and which authorities regulated the duty.

Defining Jihād through Purpose

Participation in *jihād* appears in the earliest discussions on *kifāya*-duties and is arguably the most substantive obligatory act that falls in this category. Various scholars have attempted to precisely define *jihād* and its objectives for legal purposes resulting in a definition that has grown increasingly robust over time. For example, when Shāfiʿī considers *jihād* he does so narrowly, defining its basic purpose as twofold: to prevent the enemy from entering Muslim territory and, subsequent to that, to send Muslims on military campaigns to convert disbelievers or impose a poll tax (*jizya*).²⁴⁴ Māwardī also provides a two-part definition, but includes the inner/outer dichotomy: “striving to subdue the enemy” and “strenuously striving to improve oneself.”²⁴⁵ Sarakhsī considers

²⁴³ Afsaruddin, *Striving*, 34-35. These ideas roughly correspond to the notions of *jus ad bellum* and *jus in bello*.

²⁴⁴ Bonner, *Aristocratic Violence*, 40. Cites Shāfiʿī's *Kitāb al-Umm* 4:90.9f.

²⁴⁵ Mawārdī, *al-Ḥawī al-kabīr*, vol. 14, 114; Ibn Taymiyya also speaks of a *jihād* that is fought “against the desires of one’s own soul.” Interestingly enough, he classifies this as an individual obligation (*farḍ ʿayn*) whereas he considers *jihād* as armed struggle to be a collective duty (*farḍ kifāya*). Ibn Taymiyya, *Majmūʿ al-*

jihād, in the context of armed struggle, to be a far more robust duty than Shāfi‘ī articulates, discussing it as an example of an act meant to “elevate God’s word and bring greatness to His religion.”²⁴⁶ Qarāfi goes further and describes *jihād* as a “significant act of worship” (*min al-‘ibādāt al-‘azīma*). He says that because of the esteemed manner in which *jihād* is discussed within the ḥadīth, Mālik and his associates chose to include it alongside other acts of worship in their works (*yurajjih ikhtiyār Mālik wa-aṣḥābihi fī ja‘lihi fī al-muṣannafāt ma‘ al-‘ibādāt*).²⁴⁷ On the other hand, he claims that Shāfi‘ī included *jihād* with other crimes (*jināyāt*) because he considered it a “punishment for disbelief” (*‘uqūbat al-kufr*).²⁴⁸

State, Military and *Jihād*

The “State”

Fatāwā, vol. 10, ed. ‘Āmir al-Jazzār and Anwar al-Bāz (al-Manṣūra: Dār al-Wafā’ li’l-Tibā‘ wa-l-Nashr wa-l-Tawzī‘, 2005), 357. In his classification, the *jihād* against one’s own desires is seemingly a more important obligation than participating in armed struggle.

²⁴⁶ Sarakhsī, *al-Mabsūṭ*, vol. 30, 262-63.

²⁴⁷ Qarāfi, *al-Dhakhīra*, vol. 3, 383.

²⁴⁸ Qarāfi, *al-Dhakhīra*, vol. 3, 383. It is not clear which of Shāfi‘ī’s work Qarāfi is referring to because I was unable to find any reference in *al-Umm* which referred to *jihād* as punishment for a crime. At most it might be possible to draw that inference from the discussion relating to those people from whom the poll tax (*jizya*) cannot be taken and who must instead be fought until they convert or are killed. Shāfi‘ī, *al-Umm*, vol. 5, 399-403. Furthermore, organizationally *jihād* does not appear alongside other crimes in *al-Umm*, though it also does not occur earlier in the text with the other traditional acts of worship as it does in Mālik’s *Muwatṭa’*. Other scholars, such as Ibn Qudāma, do include it alongside the discussion of other crimes. Ibn Qudāma, *al-Kāfi*, v. 5, 453.

Before proceeding further, it is worthwhile to briefly examine my use of the term “state,” which appears periodically in the present study, but does not necessarily track modern definitions of the state.²⁴⁹ The term is a source of contention in many scholarly disciplines, including the field of Islamic studies.²⁵⁰ Despite the term’s inadequacies and continued debate, my use of “state” for the premodern Islamic context is not unique.²⁵¹ Of course, there is still need for caution, especially given the challenges inherent in describing a legal culture that operated in both a different language and time period as compared to the present. As Wael Hallaq succinctly notes:

Our language fails us in our endeavor to produce a representation of that history which not only spoke different languages (none of them English, not even in British India), but also articulated itself conceptually, socially, institutionally and culturally in manners and ways vastly different from those material and non-material cultures that produced modernity and its Western linguistic traditions.²⁵²

²⁴⁹ For modern definitions, see, Thomas Hobbes, *Leviathan* (Mineola: Dover Publications, 2012), 96-103; John Hoffman, *Beyond the State: An Introductory Critique* (Cambridge: Polity Press, 1995), 19; Jean-Jacques Rousseau, *The Social Contract* (London: Penguin Books, 1968), 101-48; and, Max Weber, *Economy and Society*, trans. Ephraim Fischoff, et. al. (Berkeley: University of California Press, 1978), 56.

²⁵⁰ In theory, another term could be substituted such as “polity,” but stylistically “state” is more widespread and less burdensome on the reader.

²⁵¹ See, for example, Michael Cook, *Ancient Religions, Modern Politics: The Islamic Case in Comparative Perspective* (Princeton: Princeton University Press, 2014), 1-3; Fred M. Donner, *The Early Islamic Conquests* (Princeton: Princeton University Press, 1981), 38-39; Ira M. Lapidus, *A History of Islamic Societies* (2d ed. 2002); and, Roy Mottahedeh, *Loyalty and Leadership in an Early Islamic Society* (Princeton: Princeton University Press, 1980).

²⁵² Hallaq, *Shari‘a*, 1.

Scholars of Islamic history have offered different guidance on how to apply the term “state” to the premodern context and what pitfalls exist. For instance, Patricia Crone observes that in modern parlance the word “state” refers either to a “set of governmental institutions which constitute the supreme political authority within a given territory” or “a society endowed with such institutions, that is a politically organized society or polity.”²⁵³ However, she notes that “medieval Muslims had no word for states in either sense” and saw themselves “governed by persons rather than institutions.”²⁵⁴ It was not until the nineteenth century that an Arabic name, *dawla*, was given to a state “in both senses of the word.”²⁵⁵ That said, Crone acknowledges that despite the lack of a concept of the state, pre-Modern Muslims did have “governmental institutions” which conformed “roughly” to the concept.²⁵⁶ Fred Donner tries to complicate Crone’s definition arguing that since states are not “natural phenomena, but rather social ones,” such that each entity we define as a state will be different, the definition of the state can be modified based on “our needs and interests.”²⁵⁷ As a result,

²⁵³ Patricia Crone, *God’s Rule: Government and Islam* (New York: Columbia University Press, 2004), 3.

²⁵⁴ Crone, *God’s Rule*, 4.

²⁵⁵ Crone, *God’s Rule*, 4.

²⁵⁶ Crone, *God’s Rule*, 4.

²⁵⁷ Fred Donner, “The Formation of the Islamic State,” *Journal of the American Oriental Society* 106.2 (1986), 283.

Donner proposes a definition of the state that is comprised of three main elements: “the ordering of power in a society,” “institutional structure” and “a concept of legal authority.”²⁵⁸ Based on this definition, he contests Crone’s claim that there was no notion of a state in this early period. Donner’s examination of “documentary” evidence, alongside literary sources, led him to place the formation of an “Islamic” state to a much earlier period than Crone.²⁵⁹ In his view, a state existed from the time of the reign of ‘Abd al-Malik (A.D. 685-705) and “probably existed back into the time of Mu‘āwiyā b. Abī Sufyān (A.D. 661-680),” in other words as early as 50 years after the *hijra*.²⁶⁰ Others, like Hugh Kennedy, have suggested that a more appropriate term for this type of polity in early Islam would be “empire” since it describes a “political system in which a dominant elite rules over a collection of countries in which different areas have their own ethnic and cultural identities” and where a “dominant ideology” is present.²⁶¹

Furthermore, it is also necessary to situate “state” in relation to law. For Hallaq, to study *Shari‘a* means to speak of “law” and by extension the “state.” However, he argues that the modern conception of “state” is one that has embedded within it coercive power

²⁵⁸ Donner, “Islamic State,” 283.

²⁵⁹ Donner, “Islamic State,” 285.

²⁶⁰ Donner, “Islamic State,” 293.

²⁶¹ Hugh Kennedy, “The Decline and Fall of the First Muslim Empire,” *Der Islam* 81 (2004), 3fn1.

and this frames our thinking about the state. As he notes, “modern scholarship proceeds with extraordinary innocence, unaware of the culpable dependency of its project on the ideology of the state.”²⁶² Both terms, law and state, are problematic for Hallaq as they suggest an operating framework he considers far removed from the premodern Islamic context. For instance, Hallaq highlights one of the primary critiques of Islamic law by orientalist: the “clear and undoubtable liability” of failing to distinguish law from morality.²⁶³ His fundamental aversion to speaking of Islamic law in the context of the state arises from his view that the modern nation-state is such a drastic departure from premodern Islamic governance that it is impossible to connect Islamic law to the state. Specifically, he raises seven areas of incompatibility between Islamic law and the state, often consisting of similarity in function but difference in approach. For instance, he notes that they both are “machines of governance,” “legally productive mechanisms” and both claim “ultimate legal sovereignty.” In addition, he also notes differences, such

²⁶² Hallaq, *Sharīʿa*, 5.

²⁶³ Hallaq, *Sharīʿa*, 2. It is unfortunate, and somewhat peculiar, that Hallaq relies exclusively on orientalist scholarship by non-lawyers for his assessment of modern law in the West. As a result, he does not consider the extensive scholarship by Western legal thinkers on the relationship between law and morality. It is far from a settled issue as Hallaq seems to imply. *See, for example*, Joseph Raz, “Authority, Law and Morality,” *The Monist*, vol. 68, no. 3 (July 1985); Michael Moore, “The Various Relations between Law and Morality in Contemporary Legal Philosophy,” *Ratio Juris*, vol. 25, no. 4 (2012); Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); Patrick Devlin, *The Enforcement of Morality* (Oxford: Oxford University Press, 1965); Paul H. Robinson, *Intuitions of Justice and the Utility of Desert* (New York: Oxford University Press, 2013).

as how hierarchy functions in each; the fact that the state promotes social engineering in a way Islamic law does not; that Islamic law is bottom up, while the state is top down; and, that Islamic law does not pursue homogenization of the social order.²⁶⁴ That said, even Hallaq routinely uses the term “state” to describe different polities in Islamic history.²⁶⁵

For my purposes, the connection between Islamic law and the modern nation state has little bearing on my generic use of the term “state.” In my view the definition of state in the premodern Islamic context is a functional one: if an entity performs certain activities then the rights and responsibilities associated with political power can, in theory, be acquired. These activities include adjudicating disputes, punishing crime, regulating the marketplace, collecting taxes, administering religious services, engaging in warfare and negotiating external agreements.²⁶⁶ This conception is more expansive

²⁶⁴ Hallaq, *Shari‘a*, 361-365. Although Hallaq raises some important points in this comparison, it is hard to ignore that he essentializes Islamic law, and Muslim governance, across time periods and contexts, in order to create a neater juxtaposition with the modern state. This seems to obscure his recognition of the areas where the modern state and premodern Islamic polity shared core similarities, specifically regarding areas of law with a required role for state authority. For a more extensive exploration of the incompatibility, see generally, Wael B. Hallaq, *The Impossible State: Islam, Politics and Modernity’s Moral Predicament* (New York: Columbia University Press, 2012).

²⁶⁵ See, for example, his description of Medina as a “small state” or Yemen as a “vassal state.” Hallaq, *Shari‘a*, 27.

²⁶⁶ This is not far from what Donner proposes are the political institutions upon which the state’s legal authority rests: a governing group, army/police, judiciary, tax administration, and institutions to implement other state policies. Donner, “Islamic State,” 283. Donner also notes that the requisite

than the rigid, modern idea of a state: a centralized, administrative state with a hand in the affairs of even the remotest parts of its territory. As I discuss in the next section, although this modern conception cannot be applied to the premodern context, that does not mean that political authority was non-existent.²⁶⁷ Even more importantly, from the standpoint of intellectual history, the jurist's conception of the state did not always mirror reality. In fact, their notion of the state was in some respects more robust. Hence, Hallaq's conception of premodern Muslim governance is certainly "passive" when compared to modern governance, but does not account for a relatively active role jurists imagine for the state in the administration of certain areas of law, such as *jihād*.²⁶⁸ In this

"ideological features of the state" must be in place and be linked to its institutional features. Donner, "Islamic State," 289.

²⁶⁷ Some scholars have suggested as much by the use of terms like "non-state actors" to describe individuals who were fighting on the frontiers. Robert Haug, "Frontiers and the State in Early Islamic History: Jihād between Caliphs and Volunteers," *History Compass* 9/8 (2011): 634. While there was certainly independence from central control on the frontiers, the use of "non-state actors" is problematic for a few reasons. First, it suggests the absence of any common vision for military campaigns and instead the pursuit of independent objectives. This does not seem to be the case and instead the campaigns seem to be consistent with traditional caliphal pursuits in this realm. Second, the idea of non-state actors in the *jihād* context also rests on the assumption that at some point in the early Abbasid era, religious scholars usurped the authority of the state in matters of religion, including *jihād*. However, this seems to now be recognized as an oversimplification. As Muhammad Qasim Zaman has shown "the caliph's participation in religious life was not in competition with, or over and above that of, the emergent Sunni 'ulamā', but in conjunction with them." Muhammad Qasim Zaman, "The Caliphs, the Ulama, and the Law: Defining the Role and the Function of the Caliph in the Early Abbasid Period," *Islamic Law and Society*, vol. 4, no. 1 (1997): 4.

²⁶⁸ This idealized role is particularly important since Hallaq seems to juxtapose the historical record of the Islamic state, as opposed to the jurist's idealized notion, to argue for what Islamic law requires from the state. The jurist's notion would arguably be a better measure for determining what the *Sharī'a* requires.

context, Max Weber's well-known definition of the modern state, offered in his 1919 lecture entitled "Politics as a Vocation," is particularly useful: "the state is the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory."²⁶⁹ He goes on to note that any other entity can only "assert the right to use physical violence" when the state "permits them to do so" and the state is the "sole source of the 'right' to use violence."²⁷⁰ This concept parallels the foundational premise of the premodern jurists' discussion on *jihād* and a key prerequisite for violence: the presence of a "competent authority." They even outline the conditions necessary for agents deputized with this authority by the ruler.²⁷¹

Military and the Islamic State until 15th century

²⁶⁹ Max Weber, *The Vocation Lectures*, trans. Rodney Livingstone (Indianapolis: Hackett Publishing, 2004), 33. It should be noted that scholars like Wael Hallaq argue the opposite, suggesting that Islamic law "did not arrogate to itself monopoly over violence" and there was no attempt to subordinate society and the individual to the control of a higher political order. Hallaq, *Sharī'a*, 365. However, as Donner notes, while states sometimes recognized that "under certain conditions and within certain limits the use of force between contending groups is permissible," the state's force is always "superior" to any other group. Donner, "Islamic State," 283-284.

²⁷⁰ Weber, *Vocation*, 33.

²⁷¹ For instance, Shāfi'ī outlines several qualities that the *imām* must consider when selecting a deputy to oversee the *jihād*, including being "firm of faith" (*thiqa fī dīnihi*), "brave in body" (*shujā'an fī badanihi*), neither "hasty" (*ghayr 'ajūl*) nor "imprudent" (*naziq*), possessing "good sense" (*ḥusn al-anāh*), etc. Shāfi'ī, *al-Umm*, vol. 5, 390.

Turning from use of the term “state,” it is helpful to gain a broad sense of how Muslim fighting forces changed between the 7th and 14th centuries CE, including the evolution of their command and control. Examining juristic thought on *jihād* as a legal duty requires situating jurists within their historical context, which serves two primary purposes. First, it allows us to account for how jurists’ lived experience may have shaped their vision of state authority over the duty to fight. This “lived experience” is useful when it aligns with the legal framework that a particular jurist has constructed, as well as when the jurist departs from the prevailing practice of his time and advocates for another ideal. Second, while aware of the role that lived experience can have in juristic thought, they are also just as interested in constructing an ideal to aspire to. The reality of the Prophet’s lifetime is supremely important as the exemplar of all things Islamic. Hence, appreciating the nature of fighting forces and the authority over them during the Prophet’s lifetime may also explain the framework some jurists use as their starting point in the discussion on *jihād*.

Broadly speaking, we know that premodern Islamic armies inherited from at least three military traditions: the Graeco-Roman/Early Byzantine, the Sassanian and the

Central/Southern Arabian.²⁷² The initial Islamic fighting forces were largely made up of adult men from “Bedouin origins,” generally tracing their heritage to the tribes of Yemen.²⁷³ As a result, they had experience in various military activities, partly supported by the rich hunting heritage they came from. Hence, in comparison to “farmers and citizens of settled areas of the Near East,” these individuals were better versed in riding, archery, spearing and swordsmanship, such that they might be considered a “military population.”²⁷⁴ However, this meant that the division that eventually occurred, and became widespread, between civilians and the military did not exist in the context in which Islam first emerged. Instead, “all adult males were fighters” and it was only after later Islamic conquests, and the settlements that followed, that armies began to emerge as “discrete” groups.²⁷⁵ In addition, prior to Islam there does not seem to be any “system of remuneration” for fighting forces nor any “structure of command with coercive

²⁷² David Nicolle, *Crusader Warfare Vol. II: Muslims, Mongols and the Struggle against the Crusades 1050-1300 AD* (London: Hambledon Continuum, 2007), xi. That being said, we are at a “relatively early stage” of scholarship on “military affairs of the medieval Islamic world” in comparison to its medieval counterparts. *Ibid.*, ix.

²⁷³ Hugh Kennedy, *The Armies of the Caliphs: Military and Society in the Early Islamic State* (New York: Routledge, 2001), 1; *see also*, Nicolle, *Warfare*, 1-2.

²⁷⁴ Kennedy, *Armies*, 1.

²⁷⁵ Kennedy, *Armies*, 1. As Fred Donner has noted, it is often difficult to “disentangle” the military and civilian aspects of the early Islamic state because the first Islamic state had “all aspects of the community’s life” directed by the Prophet himself. Fred Donner, “The Growth of Military Institutions in the Early Caliphate and their Relation to Civilian Authority,” *Al-Qantara*, vol. 14 (1993): 311.

powers” outside each Bedouin tent.²⁷⁶ Each tent provided its own warriors with subsistence and weaponry, as opposed to some organizing power that did this; hence, other than the tribe, there was no “structure of command” or “regular payment” of troops at this time.²⁷⁷

The extent to which this changed with Islam is still a matter of scholarly inquiry and one must be mindful of the possibility that later Muslim historians and jurists might project structure and organization back onto the earliest Muslim fighting units.²⁷⁸ In general, the state or caliphate that emerged was, as Chase Robinson has noted,

a political and military unit, but one that was assembled by believer soldiers inspired to fight for God and His Prophet, and mustered and coordinated by men who had pledged their allegiance to a ‘commander of the faithful’ the caliph, God’s representative on earth.²⁷⁹

Features of the pre-Islamic fighting forces persisted into the early military campaigns of the Prophet, which were often “small raids against specific objectives.”²⁸⁰ Hugh Kennedy notes that the caliphs immediately succeeding the Prophet were the ones

²⁷⁶ Kennedy, *Armies*, 1.

²⁷⁷ Kennedy, *Armies*, 2.

²⁷⁸ In other words, we have to be “wary of anachronistic detail drawn from military institutions of later times” that are then projected back. Donner, “Military Institutions,” 313.

²⁷⁹ Robinson, “Conclusion,” 686.

²⁸⁰ Donner, “Military Institutions,” 315. Military administration was also simple: troops fought for “religion, the prospect of booty and because their friends and fellow tribesmen” were also fighting. Kennedy, *Armies*, 6.

who “organized and dispatched the armies which brought down” the Roman and Persian empires, even though none of them “led their armies in person.”²⁸¹ Even as early as the Battle of al-Qādisiyya in 636 CE, there are accounts of Sa’d b. Abī Waqqās, the Muslim commander, having “some sort of command structure” in which the *amīr* appointed “leaders” of various tribal units and divided the soldiers into “units of ten.”²⁸² This ten man squad or *‘irfāfa*, was “at least initially, the Muslims’ base military unit.”²⁸³ By the time of this battle, there was also greater functional specialization in the Muslim military, with formations containing “distinct echelons” and units becoming “specialized in weaponry.”²⁸⁴ In the Battle of Ṣiffīn (657 CE), Muslim scholars report that ‘Alī tried to raise an army, assembling the leaders in the society and asking them to “write down” the

²⁸¹ Hugh Kennedy, *Caliphate: The History of an Idea* (New York: Basic Books, 2016), 8.

²⁸² Kennedy, *Armies*, 10. Sa’d b. Abī Waqqās was a *muhajir* from the Quraysh and seems to have been appointed by the caliph ‘Umar because he was an early companion of the Prophet and would help resolve a brewing conflict between al-Muthannā and Jarīr “over who was to command” Muslim troops in Iraq. Donner, *Islamic Conquests*, 203. The battle at al-Qādisiyya took place against Sassanian forces, which were defeated and then pursued to the Euphrates and it is considered a decisive battle in which Muslims had “broken the back of Persian resistance in central Iraq.” Ibid., 205. Subsequently, Sa’d’s forces pursued the Persians into the “cultivated alluvium (*sawād*) of central Iraq. Ibid., 209. Though there are some conflicting sources about how Sa’d organized his army, he appears to have “gone into battle in a well-organized manner.” Ibid., 210. The battle is also important because it is considered to have the “fullest Arabic historiographic treatment of any ‘early’ engagement.” Jandora, “Archers,” 107.

²⁸³ Jandora, “Archers,” 105. The *‘irfāfa* might also be a useful unit for understanding what the state required in terms of fighting men from a town that wished to fulfill its *kifāya*-duty to fight. While the current study is focused on the theoretical doctrine of *kifāya*-duties, a future project hopes to examine references to implementation of the *jihād*-duty in the premodern period to produce a better picture of how the *kifāya*-duty functioned in practice.

²⁸⁴ Jandora, “Archers,” 111.

fighting men they had, leading to almost 65,000 names being presented.²⁸⁵ That said, beyond just a more robust command structure, organized and established armies only came “decades” after the early military successes.²⁸⁶

However, it was the later, larger campaigns that added new features to make the Muslim polity’s operations look more akin to “the army of a state” as opposed to “private forces” led by “individual tribal chiefs in pursuit of private interests.”²⁸⁷ By the reign of ‘Abd al-Malik (685-705), in the early 8th century CE, the military began to professionalize, allowing an army to emerge such that the state “maintained a standing force for defense” as opposed to requiring society to mobilize any time there was war.²⁸⁸ These forces were “carefully organized” and not “haphazard or *ad hoc*” groups of fighters.²⁸⁹ Arabic papyri indicate that an “allowance to the troops” (‘aṭā’ *al-jund*) was also created during this period and “specific tax-districts were responsible for supporting certain contingents of troops.”²⁹⁰ Hence, we can say, with some confidence, that by this stage “Muslim troops

²⁸⁵ Kennedy, *Armies*, 9.

²⁸⁶ Kennedy, *Armies*, 7. Part of this organization came earlier in the form of garrison cities (*amṣār*, sing. *miṣr*) in Kūfa, Basra, Fuṣṭāṭ and Jābiya. Ibid.

²⁸⁷ Donner, “Military Institutions,” 315.

²⁸⁸ Donner, “Islamic State,” 286. See also, Haug, “Frontiers,” 636. These professional armies were “imitated by provincial dynasties, and soon became the norm in the Islamic world” culminating in the armies of the Sāmānids, Fāṭimids, Ghaznavids and Seljuqs. C.E. Bosworth, “Military Organization Under the Būyids of Persia and Iraq,” *Oriens*, vol. 18/19 (1965/1966): 145.

²⁸⁹ Donner, “Islamic State,” 286.

²⁹⁰ Donner, “Islamic State,” 285.

were definitely an army,” as opposed to a “tribal migration.”²⁹¹ This is confirmed even further once we enter the period of Muslim conquest, where the “very scale and success of the [Islamic] conquests themselves stand as evidence in favor of the traditional view that the Muslim armies coalesced rapidly.”²⁹²

The role of Caliph, and what political authority he exercised, did not remain static over the centuries; it was subject to countless variations as the empire expanded. However, *jihād* remained an important measure of the Caliph’s authority from the start. During the initial period of transition between Umayyad and Abbasid rule, territorial expansion slowed, with military campaigns in Asia Minor coming to a halt, and the frontiers “opening up to local warlords,” occasionally joined by volunteers in “improvised *ribāṭs* (frontier forts).”²⁹³ The caliph al-Mahdī began the process of reasserting caliphal authority in this space by organizing campaigns on the frontier and

²⁹¹ Kennedy, *Armies*, 4.

²⁹² Donner, “Military Institutions,” 313. Centrally directed, large-scale expansionary warfare ceased being the primary activity of the caliphate by end of Hishām b. ‘Abd al-Malik’s (724-743) reign. Haug, “Frontiers,” 635. However, even prior to Hishām, commanders had a fair amount of autonomy to pursue campaigns, such as the expansion into Andalusia by the governor Musa b. Nuṣayr and his *mawla* Ṭariq b. Ziyad in 711. Of course, even as their power grew, these commanders remained deferential to the caliph, and paused their activities to respond to a summons back to Syria by the caliph al-Walīd. Paul M. Cobb, “The Empire in Syria 705-763,” in *The New Cambridge History of Islam, Vol 1: The Formation of the Islamic World, Sixth to Eleventh Centuries*, ed. Chase F. Robinson (Cambridge: Cambridge University Press, 2011): 232.

²⁹³ Tayeb al-Hibri, “The Empire in Iraq 763-861,” in *The New Cambridge History of Islam, Vol 1: The Formation of the Islamic World, Sixth to Eleventh Centuries*, ed. Chase F. Robinson (Cambridge: Cambridge University Press, 2011): 278.

leading one campaign in person in 780.²⁹⁴ Part of the strategy of this religious propaganda was to “set in place” the image of a warrior caliph who was “resuming the unfinished mission of the early Islamic conquests.”²⁹⁵ Al-Mahdī’s son, Hārūn al-Rashīd (786-809), seems to have taken this even further and is thought to have “more assiduously” undertaken “summer expeditions against the Byzantines” in comparison with his “predecessors or successors,” considering them an opportunity to “show himself as the military leader of the Muslims.”²⁹⁶ Hence, during what many consider the “golden age” of the Abbasids (750-809) “all aspects of Islamic military culture, organization, tactics, strategy and technology reached a remarkable level of sophistication.”²⁹⁷

However, by 870, after the “second period of power” for the Abbasids, the “extent of caliphal authority was much reduced.”²⁹⁸ The expansion of the Islamic state, in both “size and complexity,” meant that caliphs started to delegate more of their “effective power to governors, tax agents, commanders, judges and the like,” but all of them only wielded “legitimate power...in so far as they served God’s caliph on earth.”²⁹⁹ Figures like

²⁹⁴ Al-Hibri, “The Empire in Iraq,” 279.

²⁹⁵ Al-Hibri, “The Empire in Iraq,” 279.

²⁹⁶ Kennedy, *Caliphate*, 79. This was also the period when Ibn Mubārak (d. 797) is thought to have established the “religious theory and legal basis of *jihād*.” Ibid., 79.

²⁹⁷ Nicolle, *Warfare*, 2.

²⁹⁸ Kennedy, “First Muslim Empire,” 4.

²⁹⁹ Robinson, “Conclusion,” 686.

Aḥmad b. Ṭūlūn emerged, governor of Egypt from 868-884 CE and considered one of the first who became “to a large degree, independent of the central caliphate.”³⁰⁰ In 936, the Caliph al-Rāḍī instituted the post of *amīr al-‘umarā’*, a “supreme military commander” and transferred many of the powers to govern that had commonly been associated with the Caliph. The arrangement he created lasted through the Buyid and Seljuq eras to the end of the 12th century.³⁰¹ During the reign of the Abbasid caliph al-Nāṣir li-Dīnillāh (1180–1225 CE), there was an attempt to reassert “meticulous control over governance.”³⁰² He sought to “rejuvenate the institution of the caliphate” in an attempt to solidify his political position by intentionally enhancing the spiritual claim of the Caliph on Muslims everywhere.³⁰³ However, by the start of the 11th century CE, Islamic territory was already fragmented and largely “under indigenous local rulers,” with various dynasties of Andalusians, Berbers, Arabs and Kurds exercising control over different parts.³⁰⁴ They maintained a symbolic deference to the Abbasid caliphate, but remained fairly autonomous. The more industrious of these local rulers, like the Buyids

³⁰⁰ Michael Bonner, “Ibn Ṭūlūn’s Jihad: The Damascus Assembly of 269/883,” *Journal of the American Oriental Society*, vol. 130, no. 4 (2010): 573.

³⁰¹ Mona Hassan, *Longing for the Lost Caliphate: A Transregional History* (Princeton: Princeton Univ. Press, 2016), 7.

³⁰² Hassan, *Longing*, 7.

³⁰³ Hassan, *Longing*, 13.

³⁰⁴ Noelle, *Crusades*, 18.

(934-1055) and the Seljuqs of Iran (1040-1196), even exercised dominance over the caliphate.³⁰⁵

The extent of “centralization” of command over Muslim fighting forces is important for considering when they began to function like an army as opposed to separate fighting forces joined in a common effort. However, as touched on earlier, central command is conceived of differently in the premodern context than the modern one. Fred Donner speaks of a “broad spectrum of centralization,” dividing it up into three levels: conceptual, strategic and tactical. He notes that the absence of centralization at one level does not necessarily mean it will be absent at another level. For example, a “lack of Caliphal oversight over details of tactical disposition does not necessarily mean that the Caliphs had no strategic or operational oversight.”³⁰⁶ Over time, even as this caliphal oversight diminished significantly and governance became more decentralized, the office of the Caliph still represented and gave meaning to an imagined center,

³⁰⁵ Buyid rule in Baghdad occurred from 945 and led to the “complete collapse of the administration of the Abbasid caliphate” for two generations. Kennedy, *Caliphate*, 129.

³⁰⁶ Donner, “Centralized Authority,” 339. Paul Cobb has noted that it is perhaps better to refer to this process as “centralizing” as opposed to “centralization” since the “direct power of the caliph over provincial matters was at no time a *fait accompli*. Cobb, “Empire in Syria,” 241.

highlighting “the elusive desire for a righteous locus of central authority and leadership grounded in the Islamic tradition.”³⁰⁷

Despite the ever-evolving lived reality, the ideal of the earliest Caliphs seems to persist in the Muslim imagination and fundamental to every conception of the caliphate over the centuries was an “idea of leadership which is about the just ordering of Muslim society according to the will of God.”³⁰⁸ As Mona Hassan notes, the caliphate was:

an institution enmeshed with the early history of Islam, which circulated widely across Afro-Eurasia and created a shared sense of community among disparate peoples at the same time as it gave rise to differing and competing visions of the community’s past, present and future.”³⁰⁹

The caliphate had a “deep-seated cultural” association alongside the political.³¹⁰

These “associations” often merged and among the consistently important tasks sought from the caliph was conferring titles on leaders of dynasties and emirates to legitimize their authority with a broader populace.³¹¹ For both political and cultural reasons then, many of the dynasties that came to exercise *actual* control of the caliphate “never claimed for themselves any special political authority independent of the caliph’s,” at

³⁰⁷ Hassan, *Longing*, 13.

³⁰⁸ Kennedy, *Caliphate*, xiii. Mona Hassan frames this as the “elusive desire for a righteous locus of central authority

³⁰⁹ Hassan, *Longing*, 2.

³¹⁰ Hassan, *Longing*, 3.

³¹¹ These titles included standard ones like that of vizier or commander (*amīr*), but also more descriptive ones like *rukṇ al-dawla* (pillar of the dynasty) or *adud al-dawla* (support of the dynasty).

least until the rule of the Seljuqs.³¹² Hence, the Buyids never displaced the Abbasids to establish a caliph from their own tribal or sectarian ranks because, among other reasons, it allowed them to acquire some “constitutional legitimacy.”³¹³ Even when armies gained a measure of independence they often maintained a symbolic relationship with the state. For instance, the armies of the Ayyubid empire (1174-1250) were not “always loyal servants” but were “nevertheless an instrument of state.”³¹⁴

By way of further background, there are two primary categories of fighters in this early Islamic context.³¹⁵ The first was the “volunteer” (*mutaṭawwiʿ*) who performed military service without compensation (*ʿāṭā*), but who was apportioned parts of the war

³¹² Deborah Tor, “The Political Revival of the Abbasid Caliphate: Al-Muqtafi and the Seljuqs,” *Journal of the American Oriental Society*, vol. 137, no. 2 (2017): 301. Tor argues the Seljuqs were an exception to this because the “legal fiction” of deference to caliphal power despite its diminished role could not be maintained by the Seljuqs who were “too powerful” to be seen as simply governors. In addition, they had also been responsible for “liberating” the caliphate from the Shiʿi Buyids. She argues that their expanded claim of “universal” political authority can be seen in their adoption of the title *ṣulṭān* which had previously been associated with the caliph alone. *Ibid.*, 302-303.

³¹³ Kennedy, *Caliphate*, 130.

³¹⁴ R. Stephen Humphreys, “The Emergence of the Mamluk Army,” *Studia Islamica*, no. 45 (1977): 69. No single Ayyubid army existed subsequent to the death of Ṣalāḥ al-Dīn and instead there was a group of armies, each attached to different principalities. They were recruited and organized based on the “traditions, needs and capacities” of their particular principality. Humphreys, “Mamluk Army,” 70. Structurally, they did not have “units or subdivisions” and were generally “loose and improvisatory,” able to respond to the “needs of the moment.” Humphreys, “Mamluk Army,” 83.

³¹⁵ There are other categories and subcategories of soldiers as well, like the paramilitary groups known as the *ʿayyar*. See generally, D. G. Tor, *Violent Order: Religious Warfare, Chivalry and the ʿAyyar Phenomenon in the Medieval Islamic World* (Istanbul: Orient-Institut/Würzburg, 2007). However, for our purposes here the most important division is between those we might consider “salaried” fighters versus non-salaried fighters.

booty and promised divine recompense. The second category was the “non-volunteer fighter” (*muqātil*) who received a stipend, was registered in the *dīwān* and eventually formed the basis of a professional military class.³¹⁶ That said, jurists were generally uncomfortable with the commodification of religious duties, like *jihād*, and many prohibited payment in return for fulfilling obligatory acts. For instance, Sarakhsī considers it impermissible to wage *jihād* as mercenaries for rent, in the sense of one individual hiring another individual for substitute performance, because you cannot “rent an act of worship or the performance of a religious duty.”³¹⁷ Ghazālī also reports that the Shāfi‘īs reject the hiring of a Muslim to perform *jihād* on someone else’s behalf because *jihād* is a duty and cannot be transferred in that fashion.³¹⁸ However, Ghazālī argues that the head of state (*imām*) is permitted to hire slaves for *jihād* (if their masters give permission), as well as hire people who don’t meet the legal standard for

³¹⁶ Bonner, *Aristocratic Violence*, 8-9 and 149. Māwardī refers to *muqātila* by a different term with a more implicit connotation of mercenary: *mustarziqa*. Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyya*, ed. Aḥmad Mubārak al-Baghdāwī (Kuwait: Maktabah Dār Ibn Qutaybah, 1989), 48. He notes that they receive reward from the war booty according to their wealth and need. Ibid. It is not entirely clear how the *kifāya*-duty in theory was reconciled with these different categories of soldiers that eventually developed in practice. When discussing *kifāya*-duties, jurists do not seem to raise these different terms for the types of soldiers. While they clearly expressed reservations about mercenaries fulfilling the *kifāya*-duty, it is not clear that those individuals would lose the status of martyr if they were killed in battle. The prevailing assumption seems to be that in this regard there is no distinction.

³¹⁷ Sarakhsī, *Sharḥ al-Siyar*, 944.

³¹⁸ Ghazālī, *al-Wasīṭ*, vol. 7, 18.

performance of religious duties, for instance, minors and non-Muslims. As justification, he cites the fact that the Prophet permitted hiring Jewish fighters for certain military expeditions.³¹⁹ Māwardī explains that the volunteer fighters do not receive anything from the war booty (*fay*) but instead receive a portion of the *ṣadaqāt* (referring to zakat or the wealth tax levied on Muslims).³²⁰

Jurists and the Ideal State

Against this historical backdrop, jurists continued to actively try to “reconcile contemporary circumstances with the ideals of Islamic political theory” even as caliphal power abated in the tenth and eleventh centuries and the “idealized conception of the caliphate less and less mirrored reality.”³²¹ In the process, regardless of the diminished political realities of the caliphate in real life, jurists tried to incorporate the caliphate “into Islamic law as a legal necessity and a communal obligation.”³²² To some degree, this context suggests that jurists might have utilized the *kifāya*-duty as a way to navigate

³¹⁹ He gives the ruler broad latitude over the circumstances when it would be appropriate to hire people for *jihād*. Ghazālī, *Wasīṭ*, vol. 7, 16. There is a fair amount of evidence of the non-Muslim participation in Muslim military campaigns during the premodern period despite no obligation existing for them to do so. See, Nicolle, *Crusader Warfare*, x-xi.

³²⁰ Māwardī, *Aḥkām*, 48-49. This includes their cost of travel and other expenses. *Ibid.*, 158.

³²¹ Hassan, *Longing*, 4.

³²² Hassan, *Longing*, 17.

between theory and practice: they articulate an overarching command structure over *jihād*, but leave space to accommodate various local realities.³²³ Thus, as will be shown later, a role is often articulated for the state in the expansion of territory and determination of how many forces are needed, but the practicalities of producing, equipping and sustaining these fighters was left to the tribal model; jurists remained silent on these matters. In fact, even as Islamic armies became more professional and less voluntary, jurists continued to articulate the duty as though the context was the same as the earliest period. Jurists do not mention compensated professional fighters when they speak of the *jihād*-duty even when those fighters had come to play a prominent role in military campaigns. One might hypothesize that increasing state control over *jihād* up through the caliph Hārūn, when it became a state institution, defined the contours of juristic speculation in this space. The Prophetic ideal combined with the subsequent two centuries of general emphasis by the caliphs on state oversight over *jihād*, left an indelible mark on juristic discourse on the *jihād*-duty. This became the ideal and despite changes in the organization of the military, jurists did not diverge from this as their base model.

³²³ In fact, “Muslim sources suggest that the Caliphs in Madīna exercised a considerable degree of control over the armies of conquests.” Kennedy, *Armies*, 4.

An illustration of this juristic commitment to the ideal despite their lived experience was the scholarship of Māwardī, a jurist keenly aware of the political realities of his time, having been “active in the diplomatic service” of the Abbasid caliph Qā'im (r. 1031-1075).³²⁴ In that role, he negotiated various agreements with local Buyid and then Seljuq sovereigns, including securing *bay'a* for the caliph in 1031 from Abū Kālījār, a powerful Buyid sovereign in Shiraz.³²⁵ Māwardī begins his *Aḥkām al-Sulṭāniyya* by stating that the “rulership (*imāmah*) is the task (*mawḍū'a*) of the successors to prophethood who will defend the faith and manage worldly affairs (*ḥirāsat al-dīn wa-sīyāsat al-dunyā*). He goes on to note that whoever takes on these tasks is “obligated by consensus” to assume the mantle of ruler (*wa-ʿaḳḍuhā li-man yaqūm bihā fī al-ummah wājib bi-l-ijmāʿ*).³²⁶ Having established the obligation of rulership, he notes that it is a *kifāya*-duty similar to *jihād* and seeking knowledge (*fa-farḍuhā ʿalā al-kifāya ka-l-jihād wa-ṭalab al-ʿilm*) and says that as long as one person from the governed takes up the position (*idhā qāma bihā man huwa min*

³²⁴ Kennedy, *Caliphate*, 162.

³²⁵ Kennedy, *Caliphate*, 162.

³²⁶ Māwardī, *Aḥkām*, 4. He goes on to discuss whether this obligation is one that is reasoned (*bi-l-ʿaql*) or from revelation (*bi-l-sharʿ*). Those who advocate for reason argue that human beings naturally incline to submit to authority in order to prevent injustice, settle disputes and generally prevent chaos. Others argue that rulership is obligated by revelation because the *imām* is undertaking the commands of divine law. Ibid.

ahlihā) it is no longer obligatory for anyone else.³²⁷ If no one steps forward, then Māwardī says that two groups of people, and no one else, are responsible for addressing the situation: electors (who will choose an *imām*) and potential candidates for *imām*.³²⁸ He goes on to describe the conditions necessary to be an elector, as well as those needed to be an *imām*. Among the qualities an *imām* must possess are bravery and courage to “defend territory” (*ḥimāyat al-bayḍa*) and “wage war against enemies” (*jihād al-‘adūw*).³²⁹

Māwardī also discusses the extent to which authority over *jihād* can be delegated, noting that it is permissible for a *wazīr* (minister), appointed by the *imām*, to administer the waging of war himself (*yajūz an yatawallā al-jihād bi-naḥsihi*).³³⁰ He must meet two general conditions though. First, the *wazīr* must keep the *imām* informed about any actions he takes in his name in order to avoid any threat of usurping his power. Second, the *imām* must proactively remain aware of what the *wazīr* is doing.³³¹ Similarly, if an *imām* appoints an *amīr* over a particular portion of the territory, then that person acquires certain responsibilities including the obligation to wage war if the *amīr* is in a

³²⁷ Māwardī, *Aḥkām*, 4. The obligation of having an *imām* is widely agreed upon by Sunni scholars. See, Hassan, *Longing*, 99-101.

³²⁸ Māwardī, *Aḥkām*, 4-5.

³²⁹ Māwardī, *Aḥkām*, 5.

³³⁰ Māwardī, *Aḥkām*, 33.

³³¹ Māwardī, *Aḥkām*, 33.

territory bordering a hostile neighbor.³³² However, the obligation to pursue an aggressive *jihād* against a hostile enemy is only triggered for an *amīr* of a frontier town if he receives permission from the ruler (*lam yakun lahu an yabtadi' jihād illā bi-idhni al-khalīfa*); no such permission is needed if the *jihād* is for defensive purposes due to an attack.³³³ Finally, Māwardī says that one of the obligations on fighters is that they are required to submit to the authority of the *amīr* and be obedient to his commands.³³⁴

Bearing the above in mind, the remainder of this chapter examines the *jihād* duty as a way to both appreciate different elements of this duty and inform the larger category of *kifāya*-duties. It begins by exploring discussions around *jihād* as a required duty versus an optional pursuit as well as questions relating to obligatory acts, as a whole, specifically the relationship between ‘*ayn* (“individual”) obligations and *kifāya* (“collective”) duties in the *jihād* context. There is also some exploration of questions relating to who exactly bears legal responsibility for this duty and when it is triggered. Finally, the discussion concludes by examining how the *jihād* duty is regulated by both state and third parties.

³³² Māwardī, *Aḥkām*, 41.

³³³ Māwardī, *Aḥkām*, 44. It should be noted that Māwardī uses the terms *imām* and *khalīfa* interchangeably throughout the text. As Mona Hassan points out, Sunni scholars would refer to the leader as “caliph (*khalīfah*) in his capacity of succeeding the Prophet’s guardianship over the community’s affairs, *imām* in reference to his leadership position, or *amīr al-mu’minīn* for his role in commanding the faithful.” Hassan, *Longing*, 99.

³³⁴ Māwardī, *Aḥkām*, 66.

Jihād as a Legal Duty

Although the earliest legal works treat *jihād* as a *kifāya*-duty, and that is how it is treated in this chapter, the discussions around this duty indicate that at least two other opinions about the duty exist among pre-modern Muslim jurists. One set of jurists believe that a proper reading of the Qurʾān reveals that *jihād* is both an *ʿayn*-obligation and *kifāya*-duty.³³⁵ Furthermore, they note that the verses highlighting *jihād* as an *ʿayn*-obligation abrogate those indicating it is a *kifāya*-duty and thus deserve precedence. Hence, these jurists interpret the *jihād* duty in very stringent terms: every person is legally responsible for carrying out the duty. On the opposite end of the spectrum a smaller group of scholars propose a more radical thesis: *jihād* is not a duty at all. Their argument is a linguistic one and centered on the claim that the Qurʾān's discourse relating to *jihād* was read incorrectly. For them, the Qurʾānic text does not obligate but rather recommends (*nadaba*) that people participate in *jihād*.³³⁶ In other words, the

³³⁵ Qarāfi quotes al-Māzarī who reports that Ibn al-Musayyab and others said that *jihād* was actually a *farḍ* *ʿayn* based on Q 9/Tawba:36. Qarāfi rejects this by suggesting that the verse in question was actually abrogated by Q 9/Tawba: 122 and Q 4/Nisā':95. Qarāfi, *Dhakhira*, vol. 3, 385. Baghawī mentions that Ibn ʿAbbās also felt Q 9/Tawba:122 abrogated verses requiring all believers must fight. al-Ḥusayn b. Masʿūd al-Baghawī, *Sharḥ al-Sunna* vol. 10, ed. Shuʿayb al-Arnāʾūt (Beirut: al-Maktab al-Salāmī, 1983), 375.

³³⁶ Jaṣṣaṣ reports this as the view of Ibn Shubruma and Sufyān al-Thawrī. They specifically refer to the verse 2/al-Baqara:216 {fighting is ordained for you (*kutiba ʿalaykum al-qitāl*)...}. They compare it linguistically to the verse 2/al-Baqara:180 {it is prescribed (*kutiba ʿalaykum*) that he should make a proper bequest to

instruction contains an “option” since it is possible to turn down an invitation whereas a duty must be performed. For these scholars *jihād* was purely voluntary with no notion of compulsion involved. The majority opinion lies somewhere in between these two positions: *jihād* is required to be performed by some individuals within a group, but not obligated on any specific one of them. As long as some carry out the duty, then it is completed for everyone else as well.

As previously mentioned, one of the earliest discussions of *jihād* as a duty is by Shāfi‘ī. In *al-Umm*, he begins with a lengthy discussion of the phases prior to *jihād* becoming a duty, starting before Muḥammad’s prophethood to the requirement of *hijrah* (migration) and the permission (not obligation) to undertake *jihād*.³³⁷ He argues that *jihād* only becomes a duty once the Muslims attained numerical strength, as a consequence of their migration, that would allow them to confront their foes (*quwwa bi-l-‘adad lam takun*

parents and close relatives...} and suggest that the imperative form of the verb *kataba* operates with the meaning of “recommendation” in both verses. Jaṣṣaṣ, *Aḥkām*, vol. 4, 311. Others primarily read *kutiba ‘alaykum* as “invariably paraphrased” as *furiḍa ‘alaykum* (“is commanded upon you”). Firestone, *Jihad*, 60. Jaṣṣaṣ also narrates a tradition, with disputed authenticity, that once Ibn ‘Umar angrily corrected ‘Abdullah b. ‘Amr b. al-‘Āṣ after he overheard him include *jihād* in response to a man’s request for a list of religious obligations. Ibn ‘Umar listed all the same obligations, but left out *jihād*. Similarly, he mentions this as the opinion of ‘Aṭā’ b. Abī Rabāḥ and ‘Amr b. Dīnār. Jaṣṣaṣ, *Aḥkām*, vol. 4, 311. The same story is reported by ‘Abd al-Razzāq, who says Ibn ‘Umar considered *jihād* a “good act” (*al-‘aml al-ḥasan*) and not in the category of prayer, fasting, hajj, etc. ‘Abd al-Razzāq, *al-Muṣannaḥ*, vol. 5, 173. Ibn Rushd notes that this is the view of ‘Abd Allah b. al-Ḥasan. Ibn Rushd, *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid*, vol. 1, ed. ‘Abd al-Haqq al-Nadawī (Lahore: al-Maktaba al-‘Ilmiyya, 1984), 278.

³³⁷ Shāfi‘ī, *al-Umm*, vol. 5, 361-366.

qablahā fa-faraḍa Allāh ‘alayhum al-jihād).³³⁸ Shāfi‘ī outlines two interpretations of the Qur’ānic command relating to *jihād*. Both interpretations center around *jihād* being an obligatory act; he does not contemplate it as anything but a duty. First, he outlines the position that *jihād* is an ‘*ayn*-obligation, obligatory on everyone without exception, in the same manner as prayer.³³⁹ In this case, no one can perform the duty for anyone else. Second, Shāfi‘ī presents the position that the obligatory act is collective, unlike prayer, and those who perform it get supererogatory merit, fulfill the duty for others, and remove other people’s liability (specifically, prevent them from being “sinful”).³⁴⁰ Shāfi‘ī himself supports the position that *jihād* is a *kifāya*-duty. His argument centers on Q 4/al-Nisā’:95, which speaks about those who join the fight and those who stay behind both receiving a reward, noting that the verse’s literal implication is that the duty is incumbent upon everyone. However, Shāfi‘ī concludes that no penalty exists for failing to fulfill this obligation since a later portion of the verse states, with regard to those who fight and those who stay behind, “He [God] has promised all believers a good reward.”³⁴¹

³³⁸ Shāfi‘ī, *al-Umm*, vol. 5, 367.

³³⁹ Shāfi‘ī, *al-Risāla*, 363. Of course, this obligation is operational only after the pre-requisites for legal responsibility are met, for instance being mature, free, Muslim, etc. In addition, Shāfi‘ī requires soldiers to bring his own “provisions, weapons, equipment and mount, all out of his own wealth.” Bonner, “*Ja‘ā’il* and Holy War,” 60.

³⁴⁰ Shāfi‘ī, *Risāla*, 362.

³⁴¹ Shāfi‘ī, *Risāla*, 365.

He understands this to mean that staying behind does not imply a failure to fulfill the duty, because there is no penalty associated with it, but rather the very opposite: God promises both parties, fighters and those who stay behind, “a good reward.” For Shāfi‘ī, this indicates a *kifāya*-duty, which is the same position held by later jurists.³⁴² As further proof of his position, Shāfi‘ī cites Q 9/al-Tawba:122, which states that “it is not right for all believers to go out [to battle] together: out of each community, a group should go out to gain understanding of the religion, so they can teach their people.” To support this point, Shāfi‘ī notes that in various battles that Muḥammad fought, different Companions were reported to have stayed behind without suffering any repercussions, including ‘Alī b. Abī Ṭālib, who did not join the battle of Tabūk.³⁴³

Like Shāfi‘ī, Abū Bakr al-Jaṣṣaṣ (d. 981) interprets verses relating to *jihād* as specifying an obligatory act that everyone bears legal responsibility for until it is completed either by them or someone else. He discusses Q 9/al-Tawba: 38-39 as proof of a universal *jihād* duty since it strongly admonishes those who don’t join the fighting ranks: “if you do not go out and fight, God will punish you severely and put others in

³⁴² For instance, see Ismā‘īl b. Yaḥyā al-Muzanī, *Mukhtaṣar al-Muzanī* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1998), 353; Shīrāzī, *Muhadhdhab*, vol. 2, 265; Ibn ‘Abd al-Barr, *Jāmi‘a bayān al-‘ilm wa-faḍilhu*, vol. 1, ed. Abī al-Shabāl al-Zahīrī (Riyādh: Dār Ibn al-Jawzī, 1994), 60; Kāsānī, *Badā‘ī‘ al-sanā‘ī‘*, vol. 7, 98; Ibn Qudāma, *al-Kāfi*, vol. 5, 453.

³⁴³ Shāfi‘ī, *al-Risāla*, 365.

your place.” Hence, liability for the *jihād* duty extends to those who stay behind.³⁴⁴ Of course, Jaṣṣaṣ is mindful of the potential contradiction that exists between this verse and other verses that carry no punitive consequences for failure to join the battle. As noted earlier, some scholars explain these verses by reading one verse as abrogating the other. However, Jaṣṣaṣ avoids this approach instead preferring to reconcile the verses by suggesting they contemplate different circumstances which lead to different types of duties. In particular, he emphasizes that an enhanced duty exists when one resides in the “frontier,” Muslim lands bordering enemy territory. Jaṣṣaṣ argues that the verses address two different situations involving people in frontier lands. First, if people residing in the frontier lands fail to take up arms against the enemy, despite being individually obligated to fight because of their geography, the *jihād* duty is triggered for everyone else until the borders are secure. In this scenario, since the primary people responsible for performance have been derelict in their duty, legal responsibility extends broadly to everyone outside the frontier. The second scenario is where the frontline is maintained and people in that region carry out the *jihād* duty. In this case, the duty does not extend to anyone else assuming the frontier fighters are sufficient to continue countering any threats. For Jaṣṣaṣ the duty here is collective; anyone from the “interior” lands (i.e. lands

³⁴⁴ Jaṣṣaṣ, *Aḥkām al-Qurʿān*, vol. 4, 309.

beyond the frontier) who wishes to join the fight may do so, but it is also permissible for them to stay behind.³⁴⁵ Hence, he explains the two seemingly contradictory verses as addressing two different scenarios.

Other jurists also speak of *jihād* as a *kifāya*-duty. For example, Ibn ‘Abd al-Barr mentions a tradition where the Prophet is unable to secure a riding animal for every fighter that wishes to participate in the *jihād*, resulting in those people without a mount having to remain behind. More importantly, the Prophet also remains behind, leading Ibn ‘Abd al-Barr to conclude that the duty must be *kifāya* otherwise Muḥammad would not have exempted himself or permitted others to stay behind.³⁴⁶ Similarly, Ibn Rushd (d. 595/1198) goes so far as to claim consensus (*ijmā*) among jurists with regard to *jihād* being a *kifāya*-duty as opposed to an *‘ayn* one. The only exception he notes is ‘Abd Allah b. al-Ḥasan (d. 145/763), who does not consider *jihād* obligatory, but rather optional. The evidence Ibn Rushd presents for the collective nature of the obligation is a combination of Qur’ānic verses and Muḥammad’s historical precedent of always leaving some people behind when he went out to battle.³⁴⁷ Qarāfī addresses the counter-argument by Ibn al-

³⁴⁵ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 310.

³⁴⁶ Ibn ‘Abd al-Barr, *al-Istidhkār*, vol. 14, 292.

³⁴⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 278. Specifically, he cites Q 2/al-Baqara:216 as the basis of juristic consensus that *jihād* is an obligation and not voluntary: “fighting is ordained for you, though you dislike it. You may dislike something although it is good for you, or like something although it is bad for you: God

Musayyab and others that *jihād* is individually obligated based on Q 9/al-Tawba:36. He states that this verse should be considered abrogated by other verses including Q 9/al-Tawba:122 (“it is not right for all believers to go out [to battle] together”) and Q 4/al-Nisā’:95 (regarding those who stay behind being promised good).³⁴⁸

Kāsānī adds some additional layers to how the *jihād* duty should be understood. He notes that the *jihād* duty is collectively obligated in those situations where there has not been a general call to arms (*al-naḥr al-‘āmm*); in other words, in its “latent” form. He bases this opinion on the verse previously mentioned that promises “the best (reward)” (*al-ḥusnā*) to those who go forth to battle as well as those who stay behind. Furthermore, he states that the duty to stay behind is in order to engage in promoting a better understanding of the faith, which Kāsānī implies is individually obligated. Like Ibn ‘Abd al-Barr, Kāsānī mentions the fact that the Prophet did not participate in certain types of military expeditions (*sarāyā*) he dispatched. Hence, for him, it is inconceivable that the *jihād* duty be an ‘*ayn*-obligation in all circumstances.³⁴⁹ Kāsānī says that, when there is a general call to arms due to an enemy attack, only then is fighting obligatory for every

knows and you do not.” He then cites Q 9/al-Tawba:122 (previously quoted) as the reason why it is a *kifāya*-duty as opposed to an ‘*ayn*-obligation.

³⁴⁸ Qarāfī, *Dhakhīra*, vol. 3, 385.

³⁴⁹ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 7, 98.

able-bodied Muslim. Furthermore, in this scenario, even individuals in subordinate relationships, like slaves, can answer the call without permission of those with authority over them.³⁵⁰

The opinion that *jihād* does not constitute a duty seems to have been a minority opinion, although it was apparently held by luminaries like Sufyān al-Thawrī (d. 778).³⁵¹ Jaṣṣaṣ also mentions the narrative in which Ibn ‘Umar corrected ‘Abdullāh b. ‘Amr b. al-‘Āṣ’s opinion on what constitutes a religious obligation. In this instance, a man approached ‘Abdullāh and asked him what acts were obligatory. In response, ‘Abdullāh noted the five standard individual obligations – confession of faith, performance of prayer, paying the charitable tax, undertaking the major pilgrimage (*ḥajj*), and fasting in Ramadan. However, he also added “*jihād* for the sake of God” as a sixth obligation. This last point apparently angered Ibn ‘Umar, who had been within earshot of this conversation. As a result, he interjected and answered the question himself, listing the same obligations, but leaving out *jihād*.³⁵²

Similarly, Jaṣṣaṣ cites another narration in which ‘Aṭā’ b. Abī Rabāḥ (d. 734/35) was asked whether military raids were obligatory and he, along with ‘Amr b. Dīnār (d.

³⁵⁰ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 7, 98; Ghazālī, *Wasīṭ*, vol. 7, 12; Samarqandī, *Tuḥfat al-Fuqahā’*, vol. 3, 294.

³⁵¹ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 311.

³⁵² Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 311.

744), responded “we didn’t know it to be such.”³⁵³ However, Jaṣṣaṣ felt there was a subtext to the opinions of Ibn ‘Umar, ‘Aṭā’, and ‘Amr b. Dīnār that *jihād* is not a duty: it is not obligatory on everyone, in the same way as fasting or prayer, but is still a *kifāya*-duty. Jaṣṣaṣ, and others, reconcile statements that seem to disassociate *jihād* from the category of obligatory acts by qualifying what their predecessors meant by the term “obligation.” He argues that their use of the term “obligation” in certain contexts denotes obligatory acts that people are individually responsible for, but not ones in which there is collective responsibility.³⁵⁴ Jaṣṣaṣ supports this qualification by mentioning another tradition of Ibn ‘Umar in which a man came to him and declared that he would not join the military expedition because Muḥammad had only required Muslims to fulfill five obligations and *jihād* was not one of them. Ibn ‘Umar affirms this view, but says that “the Prophet abridged the obligations to just these five because what he intended to refer to were obligatory acts that were not collective.” Ibn ‘Umar goes on to note that “commanding the right and forbidding the wrong, carrying out the *ḥudūd* punishments, learning religion, washing the dead, wrapping and burying them” are all obligatory acts, but the

³⁵³ Ibid.

³⁵⁴ Ibid., 312.

Prophet does not include them in the five obligations he mentioned because, in that instance, he was speaking of ‘*ayn*-obligations.³⁵⁵

Kifāya-duty versus ‘*ayn*-obligation

As mentioned previously, the legal literature contains discussion of how *jihād* can be both a *kifāya*-duty and ‘*ayn*-obligation. In general, the literature focuses on two primary areas of inquiry. First, whether the origins of an obligatory act indicate that it began as an ‘*ayn*-obligation or a *kifāya*-duty. Second, whether it is possible for a *kifāya*-duty to be transformed into an ‘*ayn* one and, if so, how this would take place. With regard to the first question of origins, Ibn al-Jawzī puts forward an interesting framework for the stages through which the *jihād* duty passed. He begins by stating that fighting was initially prohibited, basing this on the Qur’ānic injunction in Q 4/al-Nisā’:77 that instructs believers to “drawback your hands” (*kaffū aydīkum*) in a posture of restraint.³⁵⁶ The next stage involved the imposition of the *jihād* duty for everyone based on the verse Q 9/al-Tawba:41 that seems to require everyone to go forth. Finally, he states that the duty evolved such that if some performed it then it was no longer required for everyone

³⁵⁵ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 313.

³⁵⁶ Ibn al-Jawzī, *Nawasikh al-Qur’ān*, ed. Muḥammad Ashraf ‘Alī al-Malabārī (Medina: Al-Majlis al-‘Ilmī, Ihyā’ al-Turāth al-Islāmī, 1984), 194.

else. Ibn al-Jawzī tries to explain that in the final analysis the correct position is that the *jihād* duty is in fact obligatory for everyone, but that the burden of the duty can be removed through its performance by some.³⁵⁷

Originally kifāya or ‘ayn?

Mawārdī raises the question of whether *jihād* was originally an ‘ayn-obligation and then became *kifāya* or whether it has always been *kifāya*. He recounts an opinion attributed to Abū ‘Alī b. Abī Hurayra, who argued that legal responsibility for the *jihād* duty lies with the individual based on Q 9/al-Tawba:41, which speaks of going forth to battle regardless of whether you are “light or heavy.” The suggestion here is that “light” and “heavy” are descriptions of the quality of fighters, representing opposite ends of a broad spectrum and thus indicating that everybody is included. Mawārdī describes seven different explanations scholars make for the terms “light” and “heavy,” each explanation casting a wide net over various populations including rich/poor, young/old, mounted/marching and healthy/sick.³⁵⁸ To support individual responsibility for the *jihād* duty, Mawārdī also discusses Q 9/al-Tawba:118 in which three people are apparently

³⁵⁷ Ibn al-Jawzī, *Nawasikh al-Qur’ān*, 194; see also, Reuven Firestone, *Jihad*, 61.

³⁵⁸ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 110-111.

“forgiven” for voicing “opposition” to *jihād* on one occasion during Muḥammad’s lifetime. After offering a few interpretations of what their opposition might have entailed, Mawārdī uses the specific event that gave rise to their opposition, the Tabūk military expedition, to explain why the duty triggers individual responsibility. In that expedition, Muslim forces were said to number 30,000 people. Mawārdī argues that if the duty had been *kifāya* then surely 30,000 troops would have been sufficient and the absence of three soldiers would not have resulted in a rebuke or the need for forgiveness.

³⁵⁹ Shīrāzī, on the other hand, offers a response that aims to address questions of this nature.³⁶⁰ He notes that the needs of a fighting force are determined by the governing authority and the state may have determined the sufficient number of troops required for this particular expedition were greater than 30,000, thus requiring every able-bodied person in the vicinity to participate in order to satisfy the *kifāya*-duty.³⁶¹ Hence, in this case, three soldiers would not be negligible. In addition, there may also be a legal distinction between liability incurred for silently staying behind despite being aware of

³⁵⁹ Ibid., 111.

³⁶⁰ By way of background, Shīrāzī moved from Mesopotamia to the Mecca under Mamluk suzerainty, taught there and grew in fame. He benefited from the “munificence and patronage” of the sultāns that came to power in Cairo and “continued to uphold and venerate the Abbasid Caliphate of Cairo as the bedrock of all society and politics.” Hassan, *Longing*, 131.

³⁶¹ Shīrāzī, *Muhadhdhab*, vol. 3, 269-270.

the military campaign, versus affirmatively refusing to fight and thus impacting the morale of other fighters. Mawārdī offers a scenario that would reconcile the issue: the duty may have been individualized for those three people while being a *kifāya*-duty for everyone else.³⁶² In other words, in military engagements different actors can have different levels of legal responsibility with regard to the duty to fight.

Mawārdī also advances arguments as to why the *jihād* duty has always been *kifāya*. He bases his opinion on Q 9/al-Tawba:122 which notes that “it is not right for all the believers to go out [for battle].” In his view, this verse suggests that the duty was *kifāya*, not *‘ayn*.³⁶³ However, Mawārdī’s own view was that *jihād* originated with both *‘ayn* and *kifāya* responsibility. He states that *jihād* was an individual obligation for “the emigrants” (*muhājirūn*), those people who followed the Prophet to Medina from Mecca, but his reasoning as to why this was the case is not entirely clear. He argues that it was an *‘ayn*-obligation because these emigrants were “deeply devoted to the idea of seeing the Prophet victorious” and were with him from the start.³⁶⁴ Hence, in arguably the first major military engagement of the nascent Muslim polity, the Battle of Badr, the fighting force was primarily made up of these emigrants; everyone else was exempt because *jihād*

³⁶² Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 112.

³⁶³ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 111-112.

³⁶⁴ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 112.

was only a *kifāya*-duty for them.³⁶⁵ However, Mawārdī notes that subsequent to that initial period, where *jihād* functioned both as a *kifāya*-duty and *‘ayn*-obligation, the duty came to operate only as a *kifāya* one.³⁶⁶

Mawārdī was not alone in concluding that *jihād* functioned as both a *kifāya*-duty and *‘ayn*-obligation in the earliest period. Ghazālī similarly maintained that *jihād* is *kifāya*, but was an *‘ayn*-obligation for the Prophet’s immediate Companions (*ṣaḥāba*).³⁶⁷ In fact, even those instances where the Companions reportedly failed to join the forces being deployed they were not perceived as abdicating their duties. Instead their absence was framed as the performance of another type of *jihād*: guarding the city.³⁶⁸ Similarly, according to Abū Bakr b. al-‘Arābī, both ‘Aṭā’ b. Abī Rabāḥ and al-Awzā‘ī believed that fighting was individually obligatory on the Companions while being a *kifāya*-duty on everyone else.³⁶⁹

The Issue of Proximity: From Kifāya to ‘Ayn

³⁶⁵ Mawārdī, *al-Ḥawī al-kabīr*, vol. 14, 112.

³⁶⁶ Mawārdī, *al-Ḥawī al-kabīr*, vol. 14, 112.

³⁶⁷ Ghazālī, *Wasīṭ*, vol. 7, 6.

³⁶⁸ Ghazālī, *Wasīṭ*, vol. 7, 5.

³⁶⁹ Ibn al-‘Arābī, *Aḥkām al-Qur’ān*, vol. 1, ed. Muḥammad ‘Abd al-Qādir ‘Aṭā’ (Beirut: Dār al-Kutub al-‘Ilmiyya, 2003), 205.

As mentioned in earlier chapters, jurists also envision *kifāya*-duties transforming into *ʿayn*-obligations in a given set of circumstances.³⁷⁰ This is true for the *jihād* duty as well, especially in three scenarios: circumstances where the *jihād* duty’s performance has been initiated, where inhabitants of frontier territory under Muslim sovereignty come under attack and situations involving sudden encounters with enemy forces. In the first case, the *jihād* duty transforms into an *ʿayn*-obligation for an individual as soon as they initiate performance. For jurists, every *kifāya*-duty becomes an *ʿayn*-obligation once someone takes substantial steps towards satisfying the duty. In the *jihād* context, jurists differ as to when exactly performance can be considered “initiated” with views ranging from as soon as the army begins to march to when one enters the battlefield. This condition of “obligation through initiation” proved particularly important in the context of cases involving substitution (*jaʿāʾil*): having someone else perform the duty on your behalf.³⁷¹ Shīrāzī discusses cases where people attempt to transfer their *jihād* duty to

³⁷⁰ There is some mention of this in the secondary literature as well, but the discussion is often incomplete. Rudolph Peters mentions three instances where *jihād* becomes an *ʿayn*-duty: appointment by the caliph, swearing an oath to fight and defending one’s region if it is under attack. Rudolph Peters, *Jihad*, 3-4.

³⁷¹ Substitution, in the sense of military substitute (*juʿl*), seems to be “first clearly attested” in the reign of Muʿāwiya, but there were “scattered references” prior to this as well. In the battle of Badr, “one of every two warriors” stayed at home and Abū Bakr even summoned an “army of substitutes” in his caliphate. The early references to substitution were referred to as *badīl*, which contains differences from the later concept of *jaʿāʾil*. Bonner, “*Jaʿāʾil* and Holy War,” 47.

someone else, at times in return for compensation.³⁷² In his opinion, this transfer is not valid because once the substituted individual is present on the battlefield the duty becomes *‘ayn* for him. In other words, it is no longer possible for him to satisfy a duty on behalf of someone else because he is now legally responsible for the duty himself. For Shīrāzī, the *jihād* duty’s exact nature, *kifāya* or *‘ayn*, depends on proximity to an area of conflict: being present in the conflict zone automatically obligates a person individually regardless of why they joined the battle.³⁷³ This speaks to the spatial requirement that exists for two key *kifāya*-duties, the duty to rescue and *jihād*; a sufficient number of people in *proximity* to where performance must take place are obligated to act. The Qur’ān refers to this spatial requirement in Q 9/al-Tawba:123: “You who believe, fight the disbelievers near you (*alladhīna yalūnakum min al-kuffār*) and let them find you standing firm: be aware that God is with those who are mindful of Him.”

³⁷² In general, leasing individuals to fight on your behalf was not permitted by jurists. For instance, according to Abū Ishāq al-Fazārī, Awzā’ī did not allow someone to be hired for the purpose of fighting (*sami’nā ‘annahu la yasham li-l-‘abīd wa-l-ujarā’*). He also did not require the participation of slaves (*‘abīd*), blacksmiths (*ḥaddād*) and farriers (*bīṭār*) in this category. Abū Ishāq al-Fazārī, *Kitāb al-Siyar* (Beirut: Mu‘asasat al-Risāla, 1987), 193-94; see also, Bonner, “Jihad on the Arab-Byzantine Frontier,” 21. There are several ḥadīth from the early period as well that make a distinction between someone who stays back from war, but provides a donation to a fighter versus someone who hires someone else to go in his place. Bonner, “Ja‘ā’il and Holy War,” 52. Unlike hiring someone, donations do not involve a *quid pro quo*.

³⁷³ Shīrāzī, *Muhadhdhab*, vol. 3, 266.

Other jurists also hold similar views regarding the impact of initiating (*shurūʿ*) performance on the nature of the duty. Sarakhsī advocates for an arguably stricter position with regard to when initiation occurs, suggesting that as soon as someone steps forward the *jihād* duty is assigned to them individually (*wa-huwa in kāna farḍ kifāya fa-man bāsharahu yakūn muʿaddiyyan farḍan ʿalayhi*).³⁷⁴ Ibn Qudāma suggests that *jihād* can become an individual obligation even if the initiation of performance was unintentional, such as an unexpected encounter with enemy forces; in this case, whoever is present is required to fight.³⁷⁵ Ghazālī also engages the question of whether “initiation” of a *kifāya*-duty transforms it into an ʿayn-obligation particularly in the case of *jihād*. He says that some of his colleagues believe the *kifāya* duty becomes ʿayn as a result of initiation and, subsequently, those people who have reached the age of maturity must complete the performance (*man anisa fī al-taʿalum rushdan fī nafsihi lazimahu al-itmām*). Hence, he says that even the funeral prayer becomes individually designated through commencement of the act.³⁷⁶ On the other hand, Ghazālī reports Abū Bakr Muḥammad al-Qaffāl’s (d. 975) opinion that funeral prayer cannot become an ʿayn-obligation through initiation because

³⁷⁴ Sarakhsī, *Sharḥ al-Siyar*, vol. 3, 74.

³⁷⁵ Ibn Qudāma, *Kāfī*, vol. 5, 456.

³⁷⁶ Ghazālī, *Wasīṭ*, vol. 7, 11. Nawawī also reports Ghazālī stating that “all collective duties are individualized on the basis of initiating performance” (*al-ṣaḥḥ anna al-ʿilm wa-sāʿir furūḍ al-kifāya tataʿayyan bi-l-shurūʿ*). Nawawī, *Rawḍa al-Ṭālibīn*, vol. 7, 416.

unlike other obligatory acts, prayer is one complete action (*al-ṣalāt khuṣla wāḥida*) that cannot be split into parts.³⁷⁷ Nawawī's remarks in this regard are quite similar to Ghazālī's, even at times replicating the same language. He states categorically that the *jihād* duty becomes "assigned to" any person that initiates performance of the duty as part of the fulfillment of their *kifāya*-duty (*al-jihād yaṣīr muta'ayyanan 'alā man huwa min ahl farḍ al-kifāya bi-l-shurū'*).³⁷⁸

The other main scenario in which jurists allow the *jihād* duty to transform from collective to individual involves an enemy attack on a particular locality, usually on the frontier of Muslim territory. This is a classic defensive scenario where, among other things, the preliminary steps for determining the requirements of a *kifāya*-duty (i.e. how many forces, from which localities) are not possible given the imminent nature of the attack. The situation's urgency requires everyone in proximity to the attack to engage in the fight and there are a variety of opinions that jurists put forward to regulate this scenario. One of the central questions underlying their discussion is when exactly the transition from *kifāya*-duty to *ʿayn*-obligation takes place. There seems to be an implied consensus that if enemy forces actually enter a Muslim city then it becomes immediately

³⁷⁷ Ghazālī, *al-Wasīṭ*, vol. 7, 11.

³⁷⁸ Nawawī, *Rawḍa al-Ṭālibīn*, vol. 7, 416.

obligatory for everyone to rise to its defense. However, differences exist as to the duty prior to the enemy's actual entrance into the city.

Ibn Qudāma notes that in those instances where “disbelievers set up camp in Muslim land” (*nazala al-kuffār bi-balad al-Muslimīn*) it is obligatory for its inhabitants to resist through armed force. He does not consider it permissible for any inhabitant to disengage unless they must secure “family,” “property,” or “wealth,” and alternatively, if the local authority (*amīr*) has “forbidden them from engaging in the battle.”³⁷⁹ Mawārdī frames his opinion somewhat similarly but with an important distinction. He notes that *jihād* becomes obligatory where forces are necessary both to resist enemy seizure of Muslim-controlled lands and to help secure Muslim lives and property. He does not convert the duty from *kifāya* to ‘*ayn* immediately, but rather places it initially as a *kifāya*-duty for everyone. However, for Mawārdī the key to transitioning the duty is not necessarily the location of the enemy, whether they are in the city or on its outskirts, but the persistence of the attack. If the attack persists and threatens to place frontier lands in the possession of hostile forces, Mawārdī broadens the *jihād* duty and individually obligates it for “all able-bodied inhabitants of the besieged land.”³⁸⁰ Ibn ‘Abd al-Barr is

³⁷⁹ Ibn Qudāma, *Kāfi*, vol. 5, 456.

³⁸⁰ Mawārdī, *al-Ḥawī al-kabīr*, vol. 14, 112-113. It should be noted that he continues to hold it as a collective duty for everyone else.

in agreement, noting that if the enemy attack continues, then the duty becomes individually designated on “every person in that vicinity” especially those with the “requisite strength necessary to achieve victory” regardless of whether they are “lightly armed” and “young.”³⁸¹

Nawawī mentions three scenarios prior to the actual entrance of the enemy that will convert *jihād* as a *kifāya*-duty to an ‘*ayn*-obligation: if the disbelievers “set foot on Muslim land” (*fa-idhā waṭi’a al-kuffār baldah li-l-muslimīn*), “shed innocent blood” in the land (*aṭallū ‘alayhā*) or “set up camp outside its gates, but not enter” (*nazalū bābahā qāṣidīn wa-lam yadkhulū*).³⁸² The ‘*ayn*-obligation is based on the capacity of the individual and has two levels. The first is for each person, rich or poor, to gather and prepare for battle based on their ability. The second is where they are surrounded by the disbelievers and it is not possible to gather and prepare. In that case, whoever comes across a disbeliever and knows that he will be killed if caught, it is obligatory upon him to escape and preserve his life.³⁸³ In fact, Nawawī notes that it is permissible to surrender in these circumstances as well with one interesting exception: a woman who feels surrendering

³⁸¹ Ibn ‘Abd al-Barr, *Istidhkār*, vol. 14, 292.

³⁸² Nawawī, *Rawḍa al-Ṭālibīn*, vol. 7, 416. He does note that this opinion is not shared by everyone, for instance, Ibn ‘Abī Hurayra believed it was still a collective duty.

³⁸³ *Ibid.*

would lead to her being physically violated (*imtaddat al-aydī ilayhā*) should continue to fight.³⁸⁴ Al-Ḥusayn b. Mas‘ūd al-Baghawī (d. 516/1122) says that *jihād* is individually obligated in situations where the enemy actually “enters the homes of some Muslims” or descends on the gates of a city under Muslim control. In these instances, the *jihād* duty applies to every able-bodied man in the particular town under attack, regardless of that person’s status.³⁸⁵ Jaṣṣaṣ explains that the *jihād* duty converts from *kifāya* to ‘*ayn* even in hopeless situations. He engages an interlocutor’s question as to whether it is better to fight *jihād* against the nonbelievers or seek knowledge. Jaṣṣaṣ responds that for those situations in which there is a fear of the enemy “disgracing” Muslims or overpowering them or when an insufficient number of people are available to defend the land, *jihād* becomes an individual duty and preferred to the pursuit of knowledge (*idha khīfa ma‘arrat al-‘adūw wa-iqdāmuhum ‘alā al-muslimīn wa-lam yakun bi-izā’ihi man yadfa‘uhu fa-qad ta‘ayyana farḍ al-jihād ‘alā kull aḥad*).³⁸⁶

Ghazālī individualizes the *jihād* duty in these defensive contexts, specifically requiring performance from both able-bodied men and women.³⁸⁷ While many scholars

³⁸⁴ Ibid., 417.

³⁸⁵ Baghawī, *Sharḥ al-Sunna* vol. 10, 375.

³⁸⁶ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 318.

³⁸⁷ Ghazālī, *Wasīṭ*, vol. 7, 11.

place the duty on the “inhabitants” of the frontier generally, Ghazālī mentions women specifically, presumably to stress a more important point about the rights that third parties might have on an individual and the corresponding duties they are owed. Ordinarily, a woman would need permission from a guardian, a husband or parent, to participate in *jihād* when it is a *kifāya*-duty.³⁸⁸ However, in situations where an attack has occurred and there is no time to prepare, third party rights are suspended in favor of the locality’s need for defense. In other words, everyone, regardless of their social status, is required to fight and the ordinary constraints that previously limited an individual’s involvement are no longer valid.³⁸⁹ Hence, groups normally exempt from the *jihād* duty, like slaves and married women, are required to perform it, if they possess the requisite strength, regardless of whether they receive permission from their masters or husbands, respectively.³⁹⁰ Shīrāzī also creates a similar exemption. He notes that once an enemy attack gets to the point where a Muslim population is “surrounded,” the *kifāya*-duty becomes *‘ayn* and standard pre-requisites for participation in *jihād* are suspended. In particular, he emphasizes that there is no longer a requirement to seek the permission of one’s creditors and parents prior to engaging in battle, despite both groups of people

³⁸⁸ The same holds true for sons with regard to their parents.

³⁸⁹ Ibid., 12.

³⁹⁰ Ibid., 11.

having rights over you. The reason is simple: seeking permission to defend oneself from an imminent attack is a formula for “self-destruction.” As a result, in this situation the “right” of self-defense for a besieged town’s inhabitants takes precedence over any rights that parents or creditors might have over them.³⁹¹

In addition to the duties of the frontier inhabitants, jurists also sought to explain the level of responsibility for those residing outside the frontier. For instance, Ghazālī requires non-frontier participation only if the *kifāya*-duty is not adequately addressed without it.³⁹² Similarly, Baghawī states that Muslims who reside outside a besieged town, but are the nearest fighting force, will be collectively bound to join the fight if the townspeople under attack cannot adequately fulfill the duty. However, if the townspeople are sufficient, then “outside” help is classified as optional, but not as a duty.³⁹³ Jaṣṣaṣ explains that where people in the frontier fear the enemy, lack the ability to resist and fear for their lands and offspring, then the duty automatically extends to the entire “community,” which must respond promptly.³⁹⁴ He also placed responsibility on those people that “remained behind” and let others fulfill the collective duty, noting

³⁹¹ Shīrāzī, *Muhadhdhab*, vol. 3, 269-270.

³⁹² Ghazālī, *Wasīṭ*, vol. 7, 12.

³⁹³ Baghawī, *Sharḥ al-Sunna*, vol. 10, 375.

³⁹⁴ Jaṣṣaṣ, *Aḥkām al-Qurʾān*, vol. 4, 311.

the opinion of Ibn Shihāb that people who stay behind are required to remain “alert” so they are ready to respond should they be called on to assist in the frontier.³⁹⁵ ‘Alā’ al-Dīn al-Samarqandī (d. 593/1144) considers *jihād* to be *kifāya*, but configured differently for the people who are on the borders between Muslim land and hostile territory. If the people on the front lines do not participate and the people in nearest proximity to them don’t participate, then the *jihād* duty becomes obligatory, either in the form of fighting or supplying provisions, for everyone who is able.³⁹⁶

Abū Bakr b. al-‘Arabī (d. 543/1148) configures the *kifāya* and ‘*ayn* relationship slightly differently in this context. He suggests that if Islam is dominant, then the duty is *kifāya*. However, if the enemy is dominant in a particular locality, then fighting is an ‘*ayn*-obligation on everyone.³⁹⁷ Kāsānī shares the views stated above, but makes an interesting, though straightforward, assertion with regard to the regulatory authority of the state. He notes that while normally any *jihād* duty can only be discharged with specific instruction from the “leader” (*imām*), in cases of imminent attack the inhabitants of a besieged town do not need to wait for the state’s instruction as long as they are capable of handling the hostile situation themselves. However, if they are too weak, then

³⁹⁵ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 312.

³⁹⁶ Samarqandī, *Tuḥfat al-Fuqahā’*, vol. 3, 294.

³⁹⁷ Ibn al-‘Arabī, *Aḥkām al-Qur’ān*, vol. 1, 205.

the duty falls on the people in closest proximity to the besieged town and presumably, based on how the situation develops, the state would determine whether the duty required additional support in order to be fulfilled.³⁹⁸ While this affirms the role of the state in regulating *jihād* as a whole, behavior independent of the state in these situation's is conditioned on a locality's ability to secure its own defense.

The Obligor

A key component of discussions on the *jihād* duty is focus on determining who precisely is obligated to fight. As with every other legal duty, the general prerequisites for legal responsibility must first be met: being Muslim, mature of age, sane, a male, free and able (*anna al-jihād lā yajib illā ‘alā muslim bāligh ‘āqil dhakar ḥurr mustaṭī‘*).³⁹⁹ According to Ibn Rushd, there is no dispute that *jihād* is obligatory on free men, who have reached the age of maturity, have the means to go to war, are of sound health, and have no illness.⁴⁰⁰ Ibn Qudāma also lists five similar conditions that must be met prior to engaging in *jihād*: legal capacity, absence of physical deficiency, free status, being male, and

³⁹⁸ Kāsānī, *Badā‘ī‘ al-ṣanā‘ī‘*, vol. 7, 98.

³⁹⁹ Nawawī, *Rawḍat*, vol. 7, 412. For a more extensive discussion, *see also*, Shāfi‘ī, *al-Umm*, 367-369.

⁴⁰⁰ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 278.

physical capacity.⁴⁰¹ Qarāfi puts forward six pre-requisites for carrying out the *jihād* duty: being Muslim (*islām*), mature (*bulūgh*), sane (*‘aql*), free (*ḥurriyya*), male (*dhukūra*) and physically, as well as, financially capable (*istiṭā‘a*).⁴⁰² Once these are satisfied, then the requirements specific to the *jihād* duty arise. In the *jihād* context, the idea that not everyone has to fight is reinforced by a Qur’ānic verse explicitly stating as much.⁴⁰³ Shāfi‘ī notes that as long as someone with capacity undertakes *jihād* the duty is fulfilled and he allows people to refrain from putting their name forward for *jihād* when others can fulfill the obligatory act for them.⁴⁰⁴

Furthermore, according to Ibn Ḥazm, during a military engagement with the Banū Liḥyān, Muḥammad apparently sent fighters from Hudhayl with the instruction that “one of every two men” should join the expedition, and the reward (*ajr*) would be shared between them.⁴⁰⁵ Another Prophetic ḥadīth clarifies what is meant by this account by stating that “for every one man who is sent (to battle) out of two, the reward will be for both.”⁴⁰⁶ Shīrāzī notes that this tradition relates to when the Prophet sent

⁴⁰¹ Ibn Qudāma, *al-Kāfi*, vol. 5, 454-456. ‘Abd al-Razzāq reports that 15 was the age when the duty to fight attached. ‘Abd al-Razzāq, *al-Muṣannaf*, vol. 5, 310.

⁴⁰² Qarāfi, *Dhakhīra*, vol. 3, 393.

⁴⁰³ See, Q 9/al-Tawba:122.

⁴⁰⁴ Zarkashī, *Baḥr al-muḥīṭ*, vol. 1, 243.

⁴⁰⁵ Bonner, *Aristocratic Violence*, 37 [Muslim, 3:1507; Ahmad, *Musnad* 3:49.13-15; Ibn Hazm, *Muhalla*, 7:291.11-13].

⁴⁰⁶ Ibn Ḥazm, *al-Muḥallā*, vol. 7, 291.

troops to Banī Liḥyān and those who stayed behind were told that if they supported the effort with their possessions, then they would receive half the reward of going.⁴⁰⁷ In other words, some type of “performance,” aside from fighting, was expected and required of those who stayed behind in order to receive a reward; complete inaction was not compensated.⁴⁰⁸

In general, scholars begin by broadly defining the categories of who is required to perform the duty. They use a key verse of the Qurʾān to try to develop the parameters of participation in *jihād*. The verse Q 9/al-Tawba:41 says: “So go out, no matter whether you are light or heavy (*khifāfan wa-thiqālan*), and struggle in God’s way with your possessions and your persons...”⁴⁰⁹ According to Jaṣṣaṣ, al-Ḥasan al-Baṣrī (d. 110/728), Mujāhid b. Jabr (d. 102/720) and al-Ḍaḥḥāk (d. 105/723) all believed that “light and heavy” refers to “young and old.”⁴¹⁰ Ibn Abī Ṣāliḥ (d. 84/703) is reported to have said it is a reference to

⁴⁰⁷ Shīrāzī, *Muḥadḍhab*, vol. 3, 265-266.

⁴⁰⁸ In Egypt, Arabic papyri evidence from the early 8th century suggest that this was done through “specific tax-districts” that “were responsible for supporting certain contingents of troops.” Donner, “Islamic State,” 285.

⁴⁰⁹ A slight amendment has been made to M.A.S. Abdel Haleem’s translation of this verse because he includes his own interpretation within the text. Instead of using his terms “lightly or heavily armed” I have simply used the literal translation: “lightly or heavily.” This is to allow for the subsequent point regarding the different ways in which jurists have interpreted these terms. See, *The Qurʾān* trans. M.A.S. Abdel Haleem (New York: Oxford University Press, 2004), 120.

⁴¹⁰ Jaṣṣaṣ, *Aḥkām al-Qurʾān*, vol. 4, 316; Mawārdī, *al-Ḥawī al-kabīr*, vol. 14, 110-111 (cites al-Ḥasan’s opinion). The scholars mentioned here are likely al-Ḥasan al-Baṣrī, Mujāhid b. Jabr and al-Ḍaḥḥāk b. Muzāḥim.

“rich and poor.”⁴¹¹ Ḥaṣan also reportedly said that it is both people who are “preoccupied” with other matters and those who are not.⁴¹² Ibn ‘Abbās (d. 68/687) and Qatāda (d. 117/735) reportedly said it means people who are “energetic or lazy.”⁴¹³ Ṭabarī (d. 310/922) says it is in reference to the size of the military force, suggesting that it can be either “small or large.”⁴¹⁴ Other reports claim the terms refer to those who “have a profession and those who do not.”⁴¹⁵ Jaṣṣaṣ says that the language of the verse is able to accommodate all these interpretations so the best course is to have a broad, general meaning of the duty when there is no evidence to suggest it should be narrowly construed.⁴¹⁶ As Shīrāzī notes, a broad definition was necessary since requiring everyone to fight would have preoccupied the people with fighting (*ishtaghal al-nās bi-hi*) to the detriment of the land (*kharāb al-arḍ*) thus leading to destruction.⁴¹⁷

Equipped for Battle

⁴¹¹ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 316; Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 110-111. Scholar mentioned here is Suhayl b. Abī Ṣāliḥ.

⁴¹² Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 316.

⁴¹³ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 316; Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 110-111. Scholars mentioned are ‘Abd Allāh b. ‘Abbās and Qatāda b. Dī‘āma.

⁴¹⁴ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 110-111. The reference here is likely to Muḥammad b. Jarīr al-Ṭabarī.

⁴¹⁵ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 316.

⁴¹⁶ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 316.

⁴¹⁷ Shīrāzī, *Muḥadhdhab*, vol. 3, 265.

In the early period, a critical requirement for the obligated individual was to have the necessary provisions for war. In any particular locality, it was rare that everyone would have the equipment to participate. As a result, not everyone could join the *jihād* campaigns; some would stay behind, a behavior known as *takhalluf*. An early tradition attributed to Ibn ‘Abbās notes that the community was often divided into “small groups of four, ten, etc.” and each group was required to collectively provide one fully equipped man for war.⁴¹⁸ The earliest traditions from Kufa suggest that, from these small groups, one man was sent to war and the others were burdened with “supplying the fighter with mount, weapons and supplies.”⁴¹⁹

In addition, during this early period, the Islamic state was not supplying its forces with provisions, instead, as previously mentioned, it imitated the pre-Islamic practice of fighters being supported with provisions from their communities.⁴²⁰ As one jurist notes, everyone who wished to fight “must bring his own provisions, weapons, equipment and

⁴¹⁸ Bonner, *Aristocratic Violence*, 33. Sometimes you also had a drawing of lots. Ibid., 20.

⁴¹⁹ Bonner, *Aristocratic Violence*, 37.

⁴²⁰ It should also be noted that scholars contend there is evidence that by the “early eighth century,” the state “maintained a standing force for defense” which was “carefully organized and not merely haphazard.” Donner, “Islamic State,” 286. It is not entirely clear how large this force was or whether they were permanent soldiers without other occupations. The notion of having a “salaried” military did start early with the *muqātila* during the Umayyad reign and the *abnā’* of the early Abbasid period. In fact, during the reign of al-Ma’mūn a major development occurred: soldiers in the military, “newly recruited from the empire’s periphery, became entirely reliant on the state for their survival.” Kennedy, “First Muslim Empire,” 11.

mount, all out of his own wealth. Only one who has access to (*wajada*) these things enters the category of those upon whom the performance of *jihād* is incumbent. All others are exempt.”⁴²¹ Shāfi‘ī goes so far as to say that a fighter who sets out on a campaign but then runs out of the prerequisite provisions is allowed to return home without incurring any liability.⁴²² Although technically obligated to fulfill the duty once performance is initiated (through joining the military expedition) the exhaustion of provisions negates the duty. That said, Shāfi‘ī indicates that, while it would no longer be obligatory for the person to fight, it is preferable for them to remain with the military campaign voluntarily as opposed to returning home.⁴²³

The opinion that requires possessing necessary “provisions” as a precursor to joining the *jihād* also seems to derive from the previously mentioned Qur’ānic verse regarding going forth “lightly or heavily.” In addition to the various interpretations already cited, some early authorities, like Ibn ‘Umar and ‘Abdullāh b. Jubayr, interpret the verse as speaking specifically of fighting provisions since the Qur’ān also mentions “riding mounts” and requires one to go forth for *jihād* whether “riding or walking.”⁴²⁴ Ibn

⁴²¹ Bonner, *Aristocratic Violence*, 39.

⁴²² Bonner, *Aristocratic Violence*, 39.

⁴²³ Bonner, *Aristocratic Violence*, 39.

⁴²⁴ Jaṣṣaṣ, *Aḥkām al-Qur’ān*, vol. 4, 316 (citing Ibn ‘Umar’s opinion); Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 110-111 (citing Jubayr’s opinion).

Ḥazm mentions Abū Ayyūb al-Anṣārī (d. 50/670) who, commenting on this verse, said that it applied to weaponry and noted that it covers virtually every human being since most people inevitably fall within the spectrum of “either lightly or heavily armed.”⁴²⁵ Ibn ‘Abd al-Barr mentions a tradition where the Prophet laments the fact that neither he nor members of his community were able to find the necessary riding animals to allow everyone from the community to join the *jihād*. As a result, the tradition puts forward an excuse for participation due to a lack of necessary equipment for battle, an essential one being a riding mount.⁴²⁶ Ibn Qudāma includes the possession of “equipment” and “riding animals” as specific aspects of the “physical capacity” required for fulfilling the *jihād* duty; “physical capacity” is one of the prerequisites he has for legal responsibility.⁴²⁷ Of course, this prerequisite has exceptions. For instance, Ghazālī notes that in situations where an attack is transpiring, it does not matter whether you have a riding animal or not; *jihād* is obligatory.⁴²⁸ He also connects the requirement of having a riding beast to a potential fighter’s proximity to the conflict zone, noting two opinions in this regard. If someone is a sufficient distance from the conflict zone, then some say the absence of a

⁴²⁵ Ibn Ḥazm, *Muḥallā*, vol. 7, 291. Note the individual quoted is also known as Khālīd b. Zayd b. Kulayb.

⁴²⁶ Ibn ‘Abd al-Barr, *Istidhkār*, vol. 14, 291.

⁴²⁷ Ibn Qudāma, *Kāfi*, vol. 5, 456.

⁴²⁸ Ghazālī, *Wasīṭ*, vol. 7, 12.

riding beast excuses performance of the duty. However, others argue that the importance of fulfilling this particular duty is so high that performance cannot be excused due to the absence of transportation, since presumably one could find another way to the conflict zone.⁴²⁹

Among other things, the subtext to the preceding discussion seems to be jurists' concern with outlining the scope of an individual's religious obligation when it comes to taking up arms, either defensively or offensively, in light of their context, specifically their financial standing. If they are unable to afford to equip themselves for battle, or have no one else that can equip them, and they are without a mount, their moral obligation is mitigated to some degree. As we will see later, this is mitigated even further when jurists begin to examine the clashing moral obligations that arise out of legal responsibilities to the state versus third parties.

State Authority

The assumption that underlies most pre-modern juristic discussions on the *jihād* duty is that it is regulated in some fashion by a governing authority.⁴³⁰ Unlike many

⁴²⁹ Ghazālī, *Wasīṭ*, vol. 7, 12-13.

⁴³⁰ The Twelver Shi'ī opinion on this is even more narrowly constructed: *jihād* can only be waged “under the leadership of the rightful *Imām*” and after 873 CE, “theoretically no lawful *jihād*” can be fought because

modern Muslim expositions on armed struggle, pre-modern jurists did not believe every individual possessed the right to declare *jihād*.⁴³¹ As Khaled Abou El Fadl notes:

Muslim jurists also concede a considerable amount of discretion to the ruler over issues involving dealing with foreign powers. Therefore, their discourses evidence a great amount of deference to the ruler as to when a ruler may or may not enter into a peace treaty or wage war against non-Muslims.⁴³²

The discussion of the ruler or state's authority in the context of *jihād* revolves around two central points.⁴³³ The first is a general affirmation of the state's authority to declare *jihād*. The second is the different opinions regarding the authority to obligate participation in a defensive *jihād*, meant to protect Muslim territory, as opposed to an offensive one, meant to engage the enemy within its own lands in order to expand Muslim territory.

no *Imām* exists. There is an exception for "defensive *jihād*" though and in practice various wars that have been fought since then have been framed as *jihād*. Rudolph Peters, *Jihad*, 4. That said the acceptance of state authority in this realm was not universal. In fact, one of the "distinguishing features" of the scholar-ascetics in the frontiers during the early Abbasid period was their "indifference to and at least partial rejection of the authority of the caliphs in the conduct of war." Bonner, "Jihad on the Arab-Byzantine Frontier," 6. Bonner notes that Abū Ishāq al-Fazārī came to understand "proper authority" as being present in the "religious scholar, rather than in the delegated representatives of the imam." Ibid. at 19.

⁴³¹ See, for example, 'Abd Allāh 'Azzām, *Al-Difā' 'an arāḍi al-Muslimīn: aḥamm furūd al-a'yān* (n/a: Minbar al-Tawhīd wa-l-jihād, 1984); Muḥammad 'Abd al-Salam Faraj, *Al-Jihād: al-Farīda al-ghā'iba* (n/a, 1981).

⁴³² Khaled Abou El Fadl, "The Rules of Killing at War: An Inquiry into Classical Sources," *The Muslim World*, vol. 89, no. 2 (April 1999), 150.

⁴³³ I am taking the ruler to be equivalent to the state for reasons that I outlined earlier in this chapter. Generally speaking, jurists speak of the ruler using three interchangeable terms: *khalīfah*, *imām* and *sulṭān*. For instance, see Shāfi'ī, *al-Umm*, 373 (*sulṭān*), 378 (*imām*) and 386 (*khalīfah*). The term *sulṭān* eventually acquired a non-caliphal meaning during the Seljuq period as they took it for a title despite not being caliphs.

With regard to the state's authority, Shīrāzī explicitly states that it is “detested for an attack to occur without the prior approval of a ruler or commander” (*yukrah al-ghazw min ghayr idhn al-imām aw al-amīr min qablihi*).⁴³⁴ His reasoning is that any attack will require determining whether this course of action is necessary (*‘alā ḥasab ḥāl al-ḥājah*) and the ruler, as well as his commanders, are best situated to make this determination (*a‘raf bi-dhālik*).⁴³⁵ Ibn Qudāma has the same opinion as Shīrāzī, except he is more categorical, stating that it is “not permissible” (*lā yajūz*), as opposed to simply “detested,” to leave for an attack without the permission (*al-khurūj ilā al-ghazw illā bi-idhnihi*) of the commander (*amīr*).⁴³⁶ Like Shīrāzī, Ibn Qudāma also offers reasons for why this permission was necessary based on the relative superiority of the commander's (*amīr*) knowledge regarding the “strategic advantages in warfare” (*maṣāliḥ al-ḥarb*), supply routes (*ṭuruqāt*), places of potential enemy ambush (*makāmin al-‘adūw*) and their numerical strength (*kathratihi wa-qillatihi*).⁴³⁷

⁴³⁴ Shīrāzī, *Muhadhdhab*, vol. 3, 270.

⁴³⁵ Shīrāzī, *Muhadhdhab*, vol. 3, 270.

⁴³⁶ Ibn Qudāma, *al-Kāfi*, v. 5, 497.

⁴³⁷ Ibn Qudāma, *al-Kāfi*, v. 5, 497. He brings it up again and notes that there is also a fear that ill-conceived plans of attack that occur without the commander's position could demoralize the troops. *Ibid*, 499.

Interestingly, Ibn Qudāma makes no mention of the *imām* (or *khalīfah*) whereas Shīrāzī mentions both the *imām* and the *amīr*. This is likely an indication of their different geographies, political environments and their individual relationships with the governing authorities of the time. Shīrāzī spent his life between Khurasan and Baghdad, living under Seljuq rule and maintaining close ties to the state such that the vizier in Baghdad, Niẓām al-Mulk (d. 485/1092), constructed a school in his honor.⁴³⁸ On the other hand, Ibn Qudāma spent most of his life in close proximity to the frontier, under Ayyubid rule, even fleeing to Damascus from near Jerusalem due to the Franks' mistreatment of Muslims. Most importantly, later in life, Ibn Qudāma actually joined Ṣalāḥ al-Dīn in his *jihād* to conquer Jerusalem.⁴³⁹

For his part, Ibn Ḥazm states that whoever is commanded by the ruler to join the *jihād* in the "enemy territory" (*dār al-ḥarb*), they are obligated to follow his command unless they have a legitimate excuse (*ʿudhr qāṭiʿ*).⁴⁴⁰ He quotes a famous tradition of the Prophet that the obligation to emigrate, as in the emigration to Medina, is no longer operative after the conquest of Mecca. The only exception is in the context of the *jihād* duty; hence, if you are summoned (by the ruler) to emigrate for the sake of *jihād* you must

⁴³⁸ E. Chaumont, "al-Shīrāzī," *EI2*.

⁴³⁹ G. Makdisi, "Ibn Qudāma al-Maḥḍī," *EI2*.

⁴⁴⁰ Ibn Ḥazm, *Muḥallā*, vol. 7, 291.

go forth.⁴⁴¹ Qarāfī reports a similar opinion from Saḥnūn b. Saʿīd (d. 240/854) that *jihād* is no longer obligatory (as an ʿayn-obligation) after the conquest of Mecca unless “the ruler commands it.”⁴⁴² In other words, only the ruler has the ability to physically displace you either through a general command to emigrate (now inoperative) or relocation for the sake of fulfilling the *jihād* duty.

Aside from a declaration by the ruler, the only other way a *jihād* duty can be activated is in defense of a besieged territory. In that situation, there is no need to wait for the leader’s direction. For Mawārdī, the duty is *kifāya* at first and becomes an ʿayn-obligation for everyone in the immediate vicinity depending on the duration and intensity of the attack.⁴⁴³ Ibn Qudāma notes that these are situations where the fear of harm (*yukhāf al-ḍarar*) from a surprise attack by the enemy (*mufājaʿat ʿadūw*) requires not delaying confrontation.⁴⁴⁴ This scenario is discussed in greater detail in the section on moving between *kifāya* and ʿayn obligations.

Limits on the State’s Authority

⁴⁴¹ Ibn Ḥazm, *Muḥallā*, vol. 7, 291.

⁴⁴² Qarāfī, *Dhakhira*, vol. 3, 385.

⁴⁴³ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 113.

⁴⁴⁴ Ibn Qudāma, *al-Kāfī*, v. 5, 497.

While the authority to declare *jihād* clearly resides with the state, Shīrāzī does note some limits to the state's ability to determine *who* specifically will comprise the battle ranks. Hence, while he discourages individuals from participating in *jihād* without permission from the *imām* or *amīr*, he does not forbid it. Although the governing authority determines when the military engagement will occur, what the needs are for the fighting force, and which individuals will participate, there is no liability if an individual joins the fight regardless of not receiving permission from the state.⁴⁴⁵ Of course, it is not clear whether this situation is the same as receiving a direct order not to participate, but either way it highlights the tension that exists when the state has authority to regulate religious obligations. While warfare was often in the pursuit of “secular” aims, it also contained religious undertones.⁴⁴⁶ Hence, Shīrāzī seems to, at least in part, be making space for fulfilling the *jihād*-duty to satisfy one's inner conviction even if it has not been sanctioned by the state. It is for this reason he says that while only the state can give permission to attack, if an attack were to occur without its permission it

⁴⁴⁵ Shīrāzī, *Muhadhdhab*, vol. 3, 269-270.

⁴⁴⁶ An example of this dual function where *jihād* functions as both religious obligation and state policy is Maḥmūd al-Ghaznvi's expedition to India, which provided legitimacy for his rule and elevated him to hero status. However, the campaign did “little to spread Islam or Muslim power” and was primarily aimed at gaining resources to “maintain the army,” among other things. Hugh Kennedy, “The late ‘Abbāsīd pattern 945-1050,” in *The New Cambridge History of Islam, Vol 1: The Formation of the Islamic World, Sixth to Eleventh Centuries*, ed. Chase F. Robinson (Cambridge: Cambridge University Press, 2011): 377.

would not be unlawful (*lā yuḥarram*).⁴⁴⁷ This is because the act is nothing more than self-deception (*laysa fīhi akthar min taghrīr bi-l-naḥs*) and, in the context of *jihād*, this is permissible (*yajūz fī al-jihād*) presumably because it results from the heat of the moment.⁴⁴⁸ In this way, Shīrāzī is highlighting the major tensions that exist for the jurists regarding the state's authority over *jihād*: it is fundamentally an expression of religious passion and fervor for the sake of God. To allow the state to regulate it completely not only channels significant power to them, but in some respects might serve to dampen that passion that is so essential to the religion in the first place.

There is also a difference of opinion among jurists as to how far the state can extend its authority with regard to the *jihād*-duty. The question arises as to whether a fighter is still duty-bound to engage in battle if the enemy, although present, no longer poses a threat because their ranks have been significantly depleted. Specifically, does a fighter's duty persist after securing Muslim lands and their populations? Does it extend into other territory and remain intact until the enemy converts to Islam or pays a poll tax (*jizya*)? According to the reported opinions of Ibn 'Umar, 'Aṭā', 'Amr b. Dīnār and Ibn Shubruma, if Muslim lands and populations are secure, then neither the leader nor those

⁴⁴⁷ Shīrāzī, *Muhadhdhab*, vol. 3, 270.

⁴⁴⁸ Shīrāzī, *Muhadhdhab*, vol. 3, 270.

following him are required to engage in an offensive attack on the enemy; the *jihād* duty can be completed without pursuing the enemy beyond Muslim territory.⁴⁴⁹ Others disagree and argue that the leadership and fighting force must persist in their assault until conversion or payment of the poll tax takes place. This is the position of Jaṣṣaṣ's colleagues and was reportedly also the position of some important early luminaries like al-Miqdād b. al-Aswad (d. 33/654) and Abū Ṭalḥa (d. 34/654).⁴⁵⁰ The view is also shared by Qarāfī, who considers *jihād* not only a collective duty, but one that, once engaged, must be carried out until the specific adversary has either accepted Islam or paid the poll tax.⁴⁵¹

Regarding the transformation of a defensive *jihād* duty into an offensive one, like other scholars noted above, Jaṣṣaṣ states that if enough inhabitants of the frontier are able to gather into an armed force and repel the invaders then there is technically no additional obligation, especially for people further inland. However, a point of dispute among jurists is what happens when, despite the collective duty being fulfilled, a ruler wishes to go further and issues a general call to arms for a more aggressive engagement with the enemy in order to inflict a harsher blow. Put another way, to what extent does the *jihād* duty accommodate a ruler's ability to craft military strategy. In this dispute,

⁴⁴⁹ Jaṣṣaṣ, *Aḥkām al-Qur'ān*, vol. 4, 312.

⁴⁵⁰ Jaṣṣaṣ, *Aḥkām al-Qur'ān*, vol. 4, 312.

⁴⁵¹ Qarāfī, *Dhakhīra*, vol. 3, 385.

Jaṣṣaṣ privileges the state's authority to utilize the *jihād* duty for strategic objectives beyond territorial defense. If the state mandates it, he requires those summoned to offensively engage the enemy.⁴⁵² Jaṣṣaṣ does, however, cite early authorities, like Ibn Shubruma, who reject this executive privilege because *jihād* is voluntary, not obligatory, and who interpret the Qur'ān's verses on *jihād* as invitations, not commands. These early authorities compare *jihād* verses to other verses relating to inheritance where a similar linguistic formula is used, but with the meaning of "exhorting," not requiring.⁴⁵³ Jaṣṣaṣ discusses this distinction between encouragement to engage in an activity versus a duty to perform. He argues that there must be evidence or a signifier that supports reading a phrase simply as encouragement as opposed to establishing a rule, and he considers the linguistic default for any imperative verb to be a command, not an invitation. In the case of *jihād* there is no evidence to suggest that it is not a rule, hence Jaṣṣaṣ considers it obligatory for all legally capable people and for everyone else according to their capability.⁴⁵⁴

⁴⁵² Jaṣṣaṣ, *Aḥkām al-Qur'ān*, vol. 4, 311.

⁴⁵³ Jaṣṣaṣ, *Aḥkām al-Qur'ān*, vol. 4, 311.

⁴⁵⁴ Jaṣṣaṣ, *Aḥkām al-Qur'ān*, vol. 4, 313. The "legal effects" of the imperative form is a "major point of disagreement" in Islamic legal theory (*uṣūl al-fiqh*). If there is a command to "do this" then should it be considered as falling "within the legal value of the obligatory or also within that of the recommended and the indifferent?" Wael Hallaq suggests that a "minority" of jurists held that the imperative form could equally indicate "obligation, recommendation and indifference," others said that it only signified "recommendation" and the majority said the imperative was "an instrument by means of which only

Mawārdī turns to the issue of what imperative verbs signify when discussing what triggers the *jihād* duty. He notes that aside from a defensive duty to protect Muslim lands, the duty also extends to military campaigns in the “land of disbelievers” where they are either fought until they embrace Islam or, if they do not accept Islam, agree to pay a poll tax. He argues this on the basis of Q 2/al-Baqara: 193, which uses an imperative verb to instruct people to “fight them till there is no longer chaos and all of religion belongs to God.” For Mawārdī, this verse does not individually obligate *jihād*, but rather leaves it as a *kifāya*-duty.⁴⁵⁵ Ibn ‘Abd al-Barr notes that *jihād* involving military expeditions with troops into enemy territory is a *kifāya*-duty as long as the capacity to defeat the enemy exists for those who participate.⁴⁵⁶ Again we see the tension between *jihād* as pietistic duty and *jihād* as the mechanism for achieving a ruler’s ambitions, as well as the state’s potential monopoly on participation in an activity commanded by the Qur’ān. In the defensive context, the duty to engage the enemy before you is clear but becomes less apparent when pursuing that enemy into his own lands. The pious justification weakens outside the defensive context, but jurists recognize the state’s need (supported by

obligatory acts are decreed.” Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī uṣūl al-fiqh* (Cambridge: Cambridge University Press, 1997), 48.

⁴⁵⁵ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 113.

⁴⁵⁶ Ibn ‘Abd al-Barr, *Istidhkār*, vol. 14, 292.

historical precedent) to expand its territory and continue to pursue the enemy. Hence, they create a pious motivation beyond defense of one's land, which also allows one to go on the offensive: the duty to convert people to Islam.

Impious Leaders

The tension between the state's authority and an individual's religious obligation is also highlighted in one minor point. Jaṣṣaṣ addresses the question of how the state's authority, specifically that of the head of state, is impacted by their level of piety. In other words, is it permissible to engage in *jihād* following the command of someone who is impious? Jaṣṣaṣ replies in the affirmative, stating that in the years after the four leaders who succeeded the Prophet, when there was a "decline in leadership," the Companions of the Prophet still engaged in *jihād* behind the leadership of impious commanders (*al-umarā' al-fussāq*). He specifically cites the case of Abū Ayyūb al-Anṣārī, who was involved in a military expedition led by Yazīd b. Mu'āwiya, whom Jaṣṣaṣ refers to as *al-La'īn* ("the Cursed").⁴⁵⁷ The question itself is revealing since it betrays the pietistic concerns that underlies many of the discussions regarding *kifāya*-duties. In practice, *jihād* could appear

⁴⁵⁷ Jaṣṣaṣ, *Aḥkām al-Qur'ān*, vol. 4, 319. It should be noted that the campaign referred to here is the one sent during the caliphate of Mu'āwiya in 669 CE, which laid siege to Constantinople. See, G.R. Hawting, *The First Dynasty of Islam: The Umayyad Caliphate 661-750 AD* (New York: Routledge, 2000), 42.

unsacred since it simply represented military activities in service of the state. However, its sacred place within the Qurʾān, its early history and the fact that it was a religious duty meant it carried significant devotional value. Hence, jurists struggle with the tension between *jihād* being regulated by the state and the dangers of its misuse by an unethical authority. In other words, they wrestled with whether it was moral to always obey the command of those in authority especially in those circumstances where the state was obligating people to behave sacrilegiously.

The State's Responsibility

With regard to the responsibilities of the state regarding the *jihād*-duty, Mawārdī notes that taking personal charge of the *jihād* is part of the *imām*'s official responsibilities.⁴⁵⁸ For Shīrāzī, the *imām* is required to “gather an army to remove disbelievers from Muslim lands.” Subsequent to that, he must place “trustworthy commanders” (*umarāʾ thiqāt*) throughout the retaken territory to secure it and must also provide security by building “fortresses” (*ḥiṣn*) and “digging trenches” (*ḥafr khandaq*).⁴⁵⁹ Ghazālī expands the role of the caliph (*imām*) even further when it comes to *jihād*. Not

⁴⁵⁸ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 14, 113.

⁴⁵⁹ Shīrāzī, *Muhaddhab*, vol. 3, 270.

only does he give the leader the sole right to wage *jihād*, but obligates him to make sure the duty is fulfilled regularly. He mandates that every leader raise an army annually to undertake military excursions in order to demonstrate “Islam’s presence” and put forward a “compelling propagation.”⁴⁶⁰ Ghazālī notes that these campaigns should not focus broadly on regions under the control of disbelievers, but rather advance on areas of strategic importance.⁴⁶¹ Ibn Qudāma reasons that a minimum of one military engagement per year is necessary because a tribute (*jizya*) must be collected from “non-Muslim subjects” (*dhimma*) annually “in exchange for providing them protection, which is an alternative to waging war against them” (*wa-hiya badalun ‘an al-nuṣrah fa-kadhālik mubdaluhā wa-huwa al-jihād*).⁴⁶² Qarāfī reports that ‘Abd al-Malik mandated that the ruler

⁴⁶⁰ Ghazālī, *Wasīṭ*, vol. 7, 6. Some have argued that *jihād* actually functioned as a way to legitimate a ruler, especially after the loss of political unity in the late 8th century. Rudolph Peters, *Jihad*, 5. That said, it may not be accurate to view this annual *jihād* as a “functional rule.” As Khaled Abou El Fadl has pointed out, at times a jurist might believe that they are articulating an “actual social or political practice,” but in reality it is simply “aspirational in nature.” Hence, in the case of yearly *jihād*, El Fadl argues that a misreading or change in the context in which the jurist’s statement was made may mean that the functional rule is actually aspirational. However, if the statement was meant as a moral prescription then the rule continues to remain valid regardless of the circumstances. Khaled Abou El Fadl, “Between Functionalism and Morality: The Juristic Debates on the Conduct of War,” in *Islamic Ethics of Life: Abortion, War and Euthanasia*, ed. Jonathan E. Brockopp (Columbia: University of South Carolina Press, 2003), 104.

⁴⁶¹ Ghazālī, *Wasīṭ*, vol. 7, 6.

⁴⁶² Ibn Qudāma, *Kāfī*, vol. 5, 457. He goes on to note that based on need, the *jihād*-duty can be carried out more than once a year. He does note that not all engagements with “non-Muslims” are divided into either getting tribute or fighting. For instance, fighting might be excused (or postponed) if these non-Muslims are received as guests, if it is necessary to wait for reinforcements, if the supply chain on the road to battle is not sufficient, if delaying the fight will allow them time to be tempted to become Muslim, etc. *Ibid.*, 457.

send troops on a military expedition (*ighzā' ṭā'ifa*) against the enemy once a year, either led by the ruler or a deputy of his. The purpose would be to “call them to Islam” (*yad'ūhum ilā al-islām*), “stop the harm they are causing” (*yakuffu adhāhum*), make Islam known to them, fight them till they enter the faith or pay a tribute.⁴⁶³ In addition, he notes that the ruler must take care to treat those people who join the military expedition fairly, without discrimination (presumably regarding the distribution of war booty).

Third Party Rights

While there are various reasons why individuals might be excused from the duty to participate in *jihād*, the reasons generally relate to personal characteristics that disqualify the individual's participation, for instance, mental deficiency, not having reached the age of majority, or even poverty. However, the discussion of the *jihād* duty also reveals another set of “rights” owed to third parties, which exert a power over individuals that, at times, supersedes the state's authority. These third parties include creditors, slave masters, husbands and, most importantly, parents. In these cases, even if an individual is not disqualified due to a personal characteristic, their subordinate status in relation to a third party might make them ineligible to perform. Third parties

⁴⁶³ Qarāfi, *Dhakhira*, vol. 3, 386.

are particularly interesting because ordinarily only two authorities, other than God, require subordination in Islamic law: the ruler and the jurists. These cases are especially instructive because they suggest that asserting third party rights can directly challenge a state's ability to compose its armed forces, the very backbone of its coercive power. Interestingly, discussion on third parties in the *jihād* context is relatively absent in the earliest juristic discussions though it is based on material in ḥadīth literature and so possibly has an early origin. However, in later centuries jurists begin an earnest examination of the role of parents, slave owners, creditors and husbands in curtailing the *jihād* duty for their subordinates. The basic question they are looking to answer is how the *jihād* duty, made operative by the head of state or arising out of a particular set of circumstances, contends with competing duties owed to third parties.

It is clear from the legal literature that the primary competitor to the state's authority in the *jihād* context is the duty owed to parents. Most jurists cite the famous Prophetic tradition, narrated by Ibn ʿAbbās, in which a man requests permission from the Prophet to join the *jihād*. The Prophet counters by asking whether the man's parents are still alive, to which the man responds in the affirmative. The Prophet then tells him

“your *jihād* is with them” (*fa-fihimā fa-jāhid*).⁴⁶⁴ In many respects, examining parental authority in the *jihād* context is instructive for understanding how all third party rights function. Ibn Ḥazm states that, generally speaking, it is not possible to participate in fulfilling the *jihād* duty without permission from one’s parents. This is his default position. However, he goes on to note that there are exceptions, and even exceptions to the exceptions. For instance, parental permission is not required in situations of imminent danger where the “enemy attacks a population of Muslims.”⁴⁶⁵ In this case, the duty extends to everyone in the vicinity who has the capacity to help, regardless of whether they have obtained parental permission or not. However, Ibn Ḥazm adds an exception to this: even in these circumstances, if participating in the *jihād* would “destroy” either of the parents (i.e. cause them serious emotional or physical harm) then it is not permissible to participate in the *jihād* even in the exceptional circumstances described.⁴⁶⁶ He bases his opinion on a number of commonly cited Prophetic traditions indicating the role of parental permission. He also mentions a tradition that “listening

⁴⁶⁴ Ibn Ḥazm, *Muḥallā*, vol. 7, 292; Shīrāzī, *Muhadhdhab*, vol. 3, 269; Baghawī, *Sharḥ al-Sunna*, vol. 10, 377; ‘Abd al-Razzāq, *al-Muṣannaf*, vol. 5, 175.

⁴⁶⁵ Ibn Ḥazm, *Muḥallā*, vol. 7, 292.

⁴⁶⁶ Ibn Ḥazm, *Muḥallā*, vol. 7, 292.

and obeying” one’s parents is a right they have over you, as long as they do not order you to be disobedient to God.⁴⁶⁷

In Shīrāzī’s discussion on *jihād* and parental permission he broadly contends that being righteous to one’s parents is an ‘*ayn*-obligation and thus takes precedence over the *kifāya*-duty of *jihād*.⁴⁶⁸ Shīrāzī points to a tradition of the Prophet in which he mentions righteousness towards one’s parents as taking precedence over *jihād* when considering which actions are most praiseworthy.⁴⁶⁹ Similarly, he recounts a story in which a man approached Ibn ‘Abbās, having vowed to invade Byzantine territory, but his father had forbidden it. Ibn ‘Abbas instructed him to obey his father since other fighters could be found to invade the territory, but he alone was responsible for his parents’ well-being.⁴⁷⁰ Shīrāzī continues his discussion by also contemplating whether the duty would remain when neither parent was alive. First, in cases where both parents have passed, he automatically extends authority over the child to the default guardians: the grandparents. Hence, where parents are deceased, the rights owed to them are now owed to the grandparents: an orphan is not permitted to pursue *jihād* without their

⁴⁶⁷ Ibn Ḥazm, *Muḥallā*, vol. 7, 292.

⁴⁶⁸ Shīrāzī, *Muhadhdhab*, vol. 3, 269. This is also the opinion of Ibn Qudāma. See, Ibn Qudāma, *Kāfī*, vol. 5, 457.

⁴⁶⁹ Shīrāzī, *Muhadhdhab*, vol. 3, 269.

⁴⁷⁰ Shīrāzī, *Muhadhdhab*, vol. 3, 269.

grandparent's permission. In situations where only one parent is alive but there is also a grandparent present, some debate arises as to whether any duty is owed to the grandparent. One opinion contends that parental authority, even of just one parent, eclipses all other claims of familial authority. The second opinion, which is the one Shīrāzī himself adheres to, is that the presence of a parent does not negate the requirement to be righteous towards grandparents, thus they maintain rights over the child and their permission must be sought prior to engaging in *jihād*.⁴⁷¹

Other jurists also articulate similar arguments for requiring parental permission. Ghazālī states that parental permission is a condition for fulfilling the *jihād* duty primarily because of the potential dangers an individual will face and the resulting emotional anxiety it may cause his parents.⁴⁷² Kāsānī also requires a son to get permission to fight from his parents, or one parent if the other has passed, because “devotion to parents” is an *‘ayn*-obligation that takes precedence over the *kifāya*-duty of *jihād*.⁴⁷³ Baghawī states that there is no *jihād* without the permission of Muslim parents, even if

⁴⁷¹ Shīrāzī, *Muhadhdhab*, vol. 3, 269.

⁴⁷² To support his point Ghazālī cites a ḥadīth in which a man approached the Prophet asking him for permission to join the *jihād*. The Prophet responded by asking “in what condition did you leave your parents?” The man responded that he had left them “in a state of tears” (*taraktuhumā yabkiyān*). The Prophet then told the man to go back to his parents and “make them laugh in the same manner that you made them cry” (*irja’ wa-aḍḥikhumā kamā abkaytahumā*). Ghazālī, *Wasīṭ*, vol. 7, 9.

⁴⁷³ Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 7, 98.

only one of them is alive, when *jihād* functions as a *kifāya*-duty. When *jihād* has become ‘*ayn*, for whatever reason, no permission is required.⁴⁷⁴ Baghawī notes that Awzā‘ī requires permission from both parents as a condition to participating in *jihād*; one parent’s permission is insufficient.⁴⁷⁵ He narrates a lengthy tradition from Awzā‘ī recording an exchange he had with an interlocutor. After asking Awzā‘ī about the need for both parents’ permission, the interlocutor complicates the question by wondering whether the opinion would change if the father requests the son to fight “alongside him, serve him and help him,” but the mother forbids it. Awzā‘ī reiterates his position that one parent’s permission is not sufficient. The interlocutor continues to add qualifiers and asks whether it would be different if the parents were disbelievers. Awzā‘ī again insists on both parents’ permission even if they are not Muslim, but adds a caveat. He states that “if your mother was to forbid you out of animus towards Islam, then don’t obey her. However, if she forbids you due to her own needs, then stay with her.”⁴⁷⁶ According to

⁴⁷⁴ Baghawī, *Sharḥ al-Sunna*, vol. 10, 378 (holds the same position with regard to creditors).

⁴⁷⁵ Baghawī, *Sharḥ al-Sunna*, vol. 10, 379.

⁴⁷⁶ Baghawī, *Sharḥ al-Sunna* vol. 10, 379. He notes that this position with regard to disbelieving parents was also held by Sufyān al-Thawrī. It is interesting here that Awzā‘ī focuses on the responsibility to the needs of one’s mother as opposed to one’s father. To some degree the greater responsibility owed to her suggests different, possibly higher, authority a mother has in comparison to the father. Baghawī reinforces this view by noting some scholars’ view that if you are performing the supplemental (*nafl*) prayers and your mother calls to you out of need, then you must respond. However, if your father calls then praise God, complete your prayer and then answer. Ibid., 379. Of course, the greater authority conferred upon the

Baghawī, both Awzā'ī and Sufyān al-Thawrī follow a similar opinion with regard to grandparents: permission is required from them as long as they have “need” for their grandchild. However, he does not extend the permission to uncles and aunts.⁴⁷⁷

In certain cases there is debate as to whether parental authority is superceded by other considerations. For instance, where parents are not Muslims, some jurists argue that their children no longer have to seek their permission to participate in *jihād*. However, Ibn Rushd notes that there is disagreement on this.⁴⁷⁸ Those jurists, such as Shīrāzī, who do not require permission from non-Muslim parents argue that it is because these parents are likely to have a hostile relationship to Islam.⁴⁷⁹ However, if the parents convert prior to the army marching into battle, then there is additional debate over whether permission would now be required. One opinion holds that once the individual has stepped forward to participate in *jihād*, the duty becomes an *ʿayn*-obligation for him and cannot be removed simply because the requirement of parental permission is now operative whereas it was not previously. The other opinion contends that new developments can negate the *jihād* duty, in the same way that getting sick would, and the

mother may simply reflect the reality that she is less likely to be self-sufficient in the pre-modern era as compared to the father.

⁴⁷⁷ Baghawī, *Sharḥ al-Sunna* vol. 10, 379.

⁴⁷⁸ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 278.

⁴⁷⁹ Shīrāzī, *Muhadhdhab*, vol. 3, 269.

absence of parental permission should be considered a legitimate excuse since one of the conditions for engaging in *jihād* is no longer being met.⁴⁸⁰ Similarly, Baghawī notes that if a Muslim man's parents are disbelievers then he can go forth without their permission regardless of whether the *jihād* is obligatory or voluntary.⁴⁸¹ However, he mentions a different position held by Sufyān al-Thawrī, who requires permission even from disbelieving parents. As noted above, for Awzā'ī, this is qualified by the fact that the disbelieving parents' decision to forbid their child from participation in *jihād* cannot be assumed to arise out of animus towards Islam, but should be presumed to stem from the need for their son's assistance.⁴⁸² Ibn Qudāma rejects the idea of getting permission from disbelieving parents by citing historical precedent: Abū Bakr al-Ṣiddīq, Abū Hudhayfa b. 'Utba and others waged *jihād* without the permission of their disbelieving parents.⁴⁸³

Similarly, some scholars debate whether slave parents have the right to forbid their children from participating in *jihād*. Ibn Qudāma outlines two main views in this regard. The first is that permission must be sought from them because they are entitled to the same kindness (*birr*) and compassion (*shafaqa*) as free parents, as long as they are

⁴⁸⁰ Shīrāzī, *Muhadhdhab*, vol. 3, 269.

⁴⁸¹ Baghawī, *Sharḥ al-Sunna*, vol. 10, 378.

⁴⁸² Baghawī, *Sharḥ al-Sunna*, vol. 10, 379.

⁴⁸³ Ibn Qudāma, *Kāfi*, vol. 5, 457. He does include an additional reason, saying that their respective parents' "religious commitments were suspect" (*muttahaṁān fī al-dīn*). Ibid., 457.

also Muslim.⁴⁸⁴ The second position is that permission is not necessary because they have no authority (*wilāya*), offer no support (*nafaqa*) and are unable to even grant themselves permission.⁴⁸⁵ Shīrāzī disputes this claim, arguing that despite being slaves, parents have a right to “righteousness” from their children, as commanded in the Qur’ān, and that the same anxiety over a child’s participation in *jihād* that establishes the general requirement to seek parental permission also exists in the slave context for slave parents.⁴⁸⁶

Bearing the above in mind, there are limitations to parental authority with regard to the *jihād* duty, specifically when the duty is transformed from a *kifāya*-duty to an ‘ayn-obligation. Asad al-Karābīsī (d. 570/1174) notes that in situations where there is a hostile party encamped in one’s territory permission is not required. For him, any pain that the son would cause his parents must be justified; hence, if there is no hostile party approaching, the duty remains *kifāya* and does not take precedence over an ‘ayn-obligation to care for one’s parents.⁴⁸⁷ In cases where a hostile party is approaching,

⁴⁸⁴ Ibn Qudāma, *Kāfi*, vol. 5, 457.

⁴⁸⁵ Ibn Qudāma, *Kāfi*, vol. 5, 457-8. Shīrāzī also takes note of this view, though he disagrees with it, specifically in relation to the inability to grant permission in other contexts. Shīrāzī, *Muhadhdhab*, vol. 3, 269.

⁴⁸⁶ Shīrāzī, *Muhadhdhab*, vol. 3, 269.

⁴⁸⁷ Asad al-Karābīsī, *Al-Furūq fī al-Furū*, vol. 2, ed. Aḥmad Farīd al-Mazīdī (Beirut: Dār al-Kutub al-‘Ilmiyya, 2005), 210.

permission is not required because the *jihād* duty has become *‘ayn* and *Karābīsī* privileges it over the *‘ayn*-obligation to care for one’s parents.⁴⁸⁸ Alā’ al-Dīn al-Samarqandī notes that if there is a general call to arms then it is obligatory for the son to join without the permission of his parents or without the permission of one of them if the other has passed. However, he notes that if the duty is already being fulfilled by some people then the requirement to seek permission in all the above relationships is reinstated.⁴⁸⁹ Ibn Rushd states that jurists generally agree that parental permission is a condition for fulfilling the *jihād* duty except when circumstances require the duty’s universal application. For instance, when there are an insufficient number of people to carry out the duty, then the duty no longer requires parental permission.⁴⁹⁰

The same thinking applies in the context of other third parties. For instance, Kāsānī does not permit the slave to join the fight except with the permission of his master.⁴⁹¹ His reasoning is that “service to one’s master” (*khidmat al-mawlā*) is an *‘ayn*-obligation, thus must take precedence (*muqaddaman ‘alā*) over any *kifāya*-duty.⁴⁹² Qarāfī

⁴⁸⁸ Karābīsī, *Al-Furūq fī al-Furū’*, vol. 2, 210.

⁴⁸⁹ Samarqandī, *Tuḥfat al-Fuqahā’*, vol. 3, 294.

⁴⁹⁰ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 278.

⁴⁹¹ Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 7, 98. Kāsānī also mentions similar third parties as operating parallel to this: parental authority and the requirement that a woman seek her husband’s permission to join the *jihād*. Ibid.

⁴⁹² Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 7, 98.

states the same, indicating that the “rights of the masters” (*ḥuqūq al-sādāt*) are *farḍ ʿayn* and thus precede any *kifāya*-duty.⁴⁹³ Mawārdī holds the same position and cites a Prophetic ḥadīth in support of his view that a master’s permission is required. He narrates on the authority of ʿAbd Allāh b. ʿĀmir b. Rabīʿa that once when a raiding party was passing through a town, one of the slaves of a local townswoman joined the *jihād*. When the Prophet came to know this he asked the slave whether his master had granted permission for his participation. The slave responded in the negative and the Prophet instructed him to return to his master and seek her permission. In addition, he instructed him that if he were to die there would be no prayer said for him (*law mutta lam uṣalli ʿalayka*).⁴⁹⁴ Similarly, Ghazālī allows a ruler to hire slaves for *jihād*, but only after receiving their master’s permission.⁴⁹⁵ At the same time, Ghazālī argues that a slave cannot be compelled to participate in *jihād* by his master since the master’s authority over the slave does not extend to putting his life in danger.⁴⁹⁶ If the enemy has entered into Muslim territory, he notes two valid opinions: the slave exemption from the *jihād* duty applies

⁴⁹³ Qarāfī, *Dhakhīra*, vol. 3, 393.

⁴⁹⁴ Mawārdī, *Ḥāwī al-Kabīr*, vol. 14, 114.

⁴⁹⁵ Ghazālī, *Wasīṭ*, vol. 7, 16. In fact, he allows disbelievers (*mushrikīn*) to be hired as well as long as “one is safe from their mischief” and notes that the Prophet permitted hiring Jewish fighters for certain military expeditions. *Ibid.*, 16.

⁴⁹⁶ Ghazālī, *Wasīṭ*, vol. 7, 8-9.

even in these circumstances; however obligating their participation is permissible as long as you can establish that they possess the ability to fight (*lahum ahliyyat al-qitāl*).⁴⁹⁷ In other words, you cannot send them knowing they lack the physical capacity to fight because this would mean certain death. Furthermore, the slave has no obligation to defend his master if the master decides to participate in a *jihād* himself. If the master goes out to battle, then the slave can accompany him to perform the tasks that he normally would do, but cannot be ordered to fight involuntarily.⁴⁹⁸

Concluding Thoughts

As the discussion above suggests, the *jihād* duty is instructive in helping examine the category of *kifāya*-duties as a whole. Aside from a general illustration of how *kifāya*-duties operate, the *jihād* duty also illustrates how *kifāya*-duties are transformed into *ʿayn*-obligations, in which the *jihād* duty functions as both *kifāya* and *ʿayn* at the same time and where it becomes *ʿayn*. Additionally, the discussions of *jihād* bring in important considerations regarding the ability of state and third parties to regulate *kifāya*-duties. It raises vital questions about how to reconcile the moral dimension of *jihād* for the

⁴⁹⁷ Ghazālī, *Wasīṭ*, vol. 7, 18; Samarqandī notes that it is obligatory for the slave to join the fight without the permission of his master in these situations. Samarqandī, *Tuḥfat al-Fuqahāʾ*, vol. 3, 294.

⁴⁹⁸ Ghazālī, *Wasīṭ*, vol. 7, 8-9.

individual believer and the state's need for a military force to pursue its objectives. Furthermore, it complicates the absolute authority of the state by introducing competing third parties that possess rights over the individual fighter that supersede those of the state. *Jihād* illustrates how the discourse on duties moves between pragmatic rules and theoretical principles, at times providing guidance for likely scenarios, while at other points giving space for jurists to engage in moral speculation unhindered by the constraints of practical reality. In addition, the *jihād*-duty brings to the forefront the manner in which *kifāya*-duties define the boundaries of the moral community. The jurists use *jihād* not only to tell us who must defend this community, and how sacred that duty is, but also use it to demonstrate the instrumental role of the state in giving *jihād* direction and form.

CHAPTER THREE: DUTIES TO THE DEAD

Introduction

The previous chapter on *jihād* demonstrates how the *kifāya* doctrine functions within arguably its most prominent duty. As noted, *jihād* is one of the illustrative duties in the *kifāya* category that jurists frequently reference. Another *kifāya*-duty frequently referenced by jurists is the one owed to the dead: funeral rites. Aside from its well-recognized role as a *kifāya*-duty, discussion of duties to the dead serves a broader purpose. Drawing on Marion Katz's observation that Islamic legal discourses relating to the body are important to analyze, the discourse on dead bodies is particularly revealing of the "Muslim understanding of the human experience."⁴⁹⁹ These duties traverse the boundaries of practical necessity and symbolic meaning, providing insights into preferences and hierarchies within the Islamic discourse, and impacting questions of

⁴⁹⁹ Marion Katz, *Body of Text: The Emergence of the Sunnī Law of Ritual Purity* (Albany: State University of New York Press, 2002), 1. The discussion around duties to the dead extends beyond the Islamic tradition, even receiving commentary from philosophers who speak of the "serious practical ethical problems" arising out of not recognizing "the moral interests of the dead." Jeff Noonan, "Duties to the Dead and the Conditions of Social Peace," *The European Legacy* 17, no. 5 (2012): 594. Likewise, other premodern religious traditions navigated similar questions around the dead. For instance, in the Jewish tradition, the rules around burial were "an elaboration of meticulous behavioural rules designed to protect the living from contamination at the same time as they carry out the serious obligation on all Jews to participate in the burial procedures." Jon Davies, *Death, Burial and Rebirth in the Religions of Antiquity* (New York: Routledge, 1999), 95. Furthermore, the "task of burial" was considered "incumbent upon the whole community" and a "particular duty of the family." Jon Davies, *Antiquity*, 104.

gender, kinship, purity and religion itself. In some respects, this discourse represents a departure from Mary Douglas' claim that "practical interest in living and not an academic interest in metaphysics" is what produces significance of ritual; in the duties to the dead pragmatism and metaphysics have equal space in the construction of meaning.⁵⁰⁰ As with previous chapters, the focus here is on the juristic dialectics exploring these matters in treatises of substantive law, specifically chapters devoted to "funerals" (*kitāb al-janā'iz*) and how it might inform our understanding of *kifāya*-duties. As Leor Halevi has noted, "funerary traditions played a special role in Muslim societies" and form "part of an ideological discourse on everyday life."⁵⁰¹ Within this space then there is much to be gained not only concerning the parameters of legal obligation in Islamic law, but also how these obligations order Muslim life even at the end. In this ordering, jurists address three primary objectives: how to be pragmatic regarding the dead, how to preserve a sacred ritual dimension within the funerary duties and how to navigate the boundaries of the Muslim community. These objectives are not necessarily

⁵⁰⁰ Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (New York: Routledge, 2001), 90.

⁵⁰¹ Leor Halevi, "Wailing for the Dead: The Role of Women in Early Islamic Funerals," *Past & Present*, no. 183 (May, 2004): 11. These traditions were not fixed though; ritual practice was not static, but rather the law around it developed over time. Khaled Blankenship, review of *Muhammad's Grave: Death Rites and the Making of Islamic Society*, by Leor Halevi, *American Historical Review* (Dec. 2009): 1572.

in conflict, but at times one objective might be emphasized over another. In the same vein, the boundaries of the Muslim community highlight the tensions between religious and familial affiliations.

Regarding what the core sources have to say about duties to the dead, while the other original duties, *jihād* and the pursuit of knowledge, are connected by their mention in the same verse, the Qurʾān makes no mention of funeral rites or the obligation to perform them. This absence of funeral rites in the Qurʾān is especially peculiar given the numerous mentions of death throughout the text, primarily to exhort people to perform acts in anticipation of an afterlife. The earliest chapters of the Qurʾān, commonly associated with the Meccan period of Muḥammad’s revelation, are dominated by apocalyptic themes, reward and punishment. The only verse that speaks of funeral prayers, Q 9/al-Tawba:84, is one that prohibits its performance for the “hypocrites” (*munāfiqūn*) who refused to participate in *jihād*: “do not hold funeral prayers for any of them if they die, and do not stand by their graves—they disbelieved in God and His Messenger and died rebellious.”⁵⁰²

⁵⁰² The term “hypocrites” does not cover the full range of the Arabic word being translated, but is a Median term of abuse in the Qurʾān. Broadly speaking, “hypocrites are considered half-hearted believers who outwardly profess Islam while their hearts harbor doubt or even unbelief. Camilla P. Adang, “Hypocrites and Hypocrisy,” in *Encyclopedia of the Qurʾān*, ed. Jane Dammen McAuliffe, <https://bit.ly/2w1BR39>.

The ḥadīth literature provides more references to the particulars of funeral rites, but scarcely mentions the nature of the obligation owed. In fact, explicit proof-texts from Muḥammad’s statements are seldom used by jurists as the primary justification for specific obligations. When jurists rely on the core sources they tend to utilize scriptural proof-texts tangentially connected to their arguments. However, despite the absence of direct proof-texts, virtually all legal manuals, across the schools, obligate the performance of certain duties to the dead. In addition to the limited proof-texts, jurists also rely on reported practices of Muslims from earlier periods, as well as their own intuitions, to construct a framework of duties owed to the dead. Notably, there is never any discussion of the origin of these rites, although Kāsānī does offer one interesting exception to this. He relates that when the prophet Ādam passed away, angels bathed him then said to his son “this is a *sunnah* of death, and it is a categorical *sunna* (*sunnah muṭlaqah*) meaning [it is] obligatory (*wājib*).”⁵⁰³ Kāsānī claims that these rites were passed down from the time of Ādam and then abandoned just like other “inherited *sunnah*” (*sunnah mutawārithah*).⁵⁰⁴

⁵⁰³ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 299.

⁵⁰⁴ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 299.

The legal literature discusses five primary rites as funerary duties: ritually washing the body, shrouding it, praying over the body, carrying and burying it.⁵⁰⁵ These duties are typically found either in standalone chapters on funerals (*janā'iz*) or as part of chapters on other topics, such as the ones on prayer. The duties in this context are generally framed as “rights” (*ḥaqq*) owed to the dead.⁵⁰⁶ In addition to these main duties to the dead, jurists also explore more minor questions connected to funerals such as who is permitted to attend the burial, whether someone can cry at the gravesite, what to do when an individual is close to dying, etc. Not all of these issues are characterized as obligations; as with other *kifāya*-duties, jurists intersperse discussion of obligatory acts with acts that are merely preferred or recommended. Hence, there is a significant amount of material concerning death and funerals, but this chapter focuses exclusively on matters related to duties owed to the dead. Even in this regard, it is not possible to cover every aspect of these duties, and so the aim will be to cover major points of

⁵⁰⁵ Kāsānī frames it as six main topics, considering martyrdom to be a standalone topic. I discuss martyrdom in this chapter separately as the last exceptional category of standard funerary duties. Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 1, 299.

⁵⁰⁶ For instance, Shāfi'ī reportedly said that one should not be “negligent of the rights of their brother” after death. Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6. Likewise, there is mention in a Prophetic ḥadīth that among the rights owed to other Muslims (*‘alā al-Muslim sittun ḥuqūqun*) is the right to be washed after they pass. Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 1, 299. In another tradition, this is spoken of as a “debt” that is owed to the dead. Ibn Ḥazm, *al-Muḥallā*, vol. 5, 115.

emphasis and dominant themes that emerge.⁵⁰⁷ It is neither feasible nor arguably necessary to cover everything else.

Regarding classification of funeral rites, jurists tend to be aligned in their view that these acts are obligatory. Kāsānī states categorically that there is *ijmāʿ* on these acts being obligatory.⁵⁰⁸ Furthermore, he says that the nature of the obligation is *kifāya*: as long as some undertake the obligation it is suspended for everyone else. For Kāsānī, he reads the *kifāya* doctrine as centering on the attainment of an obligation’s purpose (*ḥuṣūl al-maqṣūd*) and once that occurs the obligation is satisfied such that replicating it leads to no additional benefit.⁵⁰⁹ Similarly, Mawārdī says that washing the dead, shrouding them, praying over them, and bringing them to the burial site are all “duties upon Muslims collectively, but addressed to them individually” (*furiḍa ʿalā kāffat al-Muslimīn wa-l-kull bihi mukhāṭabūn*).⁵¹⁰ Ibn Ḥazm affirms what Kāsānī says regarding *ijmāʿ*, noting that “there is no difference” among scholars on the fact that funeral rites are *kifāya*-

⁵⁰⁷ That said, at certain points it may be relevant to the discussion to also explore acts that are classified as preferred or recommended.

⁵⁰⁸ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 299.

⁵⁰⁹ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 300.

⁵¹⁰ Mawārdī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

duties. Within these rites he includes “washing the dead,” “shrouding them,” “burying them” and “praying over them.”⁵¹¹

With this in mind, the present chapter will explore various components of the *kifāya*-duties relating to funeral rites. It begins with an exploration of what I characterize as the “standard” funeral rites: those duties owed to a deceased Muslim male of legal capacity. These standard duties will be explored for the four main funeral rites, listed in order of occurrence: ritual washing, shrouding, prayer and burial.⁵¹² Having established baseline duties relating to funeral rites, the chapter then turns its attention to jurists’ exploration of “exceptional” circumstances that require departures from standard duties. These circumstances demonstrate how the identity of the deceased impacts the duties owed and the manner in which those duties are performed. The chapter identifies six exceptional categories, based on the characteristics of the deceased, that are the jurists’ primary concern. First, gender, namely whether the deceased is a woman, plays an important role in altering both how a rite is performed and who performs it. Second, the deceased’s association with sinfulness: specifically, whether they have committed crimes, been labelled a hypocrite or branded a rebel. Third, whether the deceased was a

⁵¹¹ Ibn Ḥazm, *Muḥallā*, vol. 5, 121.

⁵¹² The last rite, burial, includes both transporting the body to the burial site and the actual burial itself.

child, in other words whether they satisfied the necessary conditions to be liable for their actions. Fourth, when the deceased is a nonbeliever; specifically, those scenarios where the deceased is not Muslim, but is related to Muslims. This raises the possibility of non-Muslim relatives performing funeral rites on the basis of kinship or having Muslim rites performed for them when they die. Fifth, when the deceased cannot be identified (are essentially “strangers”), but die in areas where the Muslim polity or community has jurisdiction. In these circumstances, a decision has to be made as to what rites should be performed for them, with an eye towards accounting for the possibility they are not Muslim. Finally, the sixth case, when the deceased is classified as a martyr, whether in the context of war or outside of it. The war context is especially fascinating since it allows certain characteristics to attach to the individual temporarily at the onset of battle and permanently if they are killed.

After exploring the particulars of the duties in each of the rites that are performed, the chapter concludes by trying to use a wider lens to uncover broader themes within the duties to the dead. Specifically, I explore how jurists discuss the purpose of these rites and the obligations attached to them. The discussion centers on whether the objectives of these duties are for reasons pertaining to mere efficacy or some higher purpose. In addition, I look closely at the discourse on praxis, namely the

process by which the obligation is fulfilled. There are two themes that emerge in this regard. The first is the sequence jurists require in the performance of the duty; what specific steps need to occur before others can be taken. The second is the hierarchy jurists outline for *who* performs the duty; in other words, which performers must be given precedence over other performers in carrying out the duty. In both cases, the method of performing funeral rites, as well as the hierarchies of performers and performance, are considered essential to the obligation.

Standard Duties

This section discusses the standard duties that the dead are entitled to. The framework for these duties assumes that the deceased, as well as those performing the rites, are male, Muslim and fulfill the conditions for legal liability. The standard duties set the baseline from which the exceptional cases derive and help establish the parameters of this category of “funerary” duties.

Funeral Prayer

As noted earlier, funeral rites are often discussed in their own separate chapters of legal manuals but also in those that deal with prayer. Like funeral rites as a whole,

there is broad agreement among jurists that funeral prayer is obligatory. Ibn Rushd notes that the majority of scholars (*ahl al-‘ilm*) permit praying over anyone who says “there is no deity, except for God,” an idea they derive from a Prophetic tradition stating the same.⁵¹³ Ibn Ḥazm explicitly states that the obligation is for both male and female Muslims to be prayed over.⁵¹⁴ Māwardī cites a Prophetic ḥadīth stating it is “obligatory upon my community to pray over their own.”⁵¹⁵ Ibn ‘Abd al-Barr claims there is a consensus that it is not permissible to forgo the funeral prayer of any Muslim, whether sinful or righteous, except martyrs, fornicators and religious innovators.⁵¹⁶ Ghazālī and Qarāfī echo this sentiment, emphasizing that while funeral prayer must be performed on every Muslim, it cannot be performed on anyone who has been martyred, an exceptional circumstance taken up later in this chapter.⁵¹⁷ In addition, Ghazālī says that once initiated the funeral prayer becomes obligatory.⁵¹⁸ Ibn al-‘Arabī addresses the absence of any direct proof-text from the Qur’ān regarding funeral prayer. As noted at the start of the chapter, the sole verse that mentions funeral prayer, Q 9/al-Tawba: 84, does not

⁵¹³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

⁵¹⁴ Ibn Ḥazm, *Muḥallā*, vol. 5, 113 and 115.

⁵¹⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 52.

⁵¹⁶ Ibn ‘Abd al-Barr, *al-Tamhid* 6:331-332.

⁵¹⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 375; Qarāfī, *Kitāb al-furūq*, 236.

⁵¹⁸ Ghazālī, *al-Wasīṭ*, vol. 7, 11.

explicitly obligate it, but only prohibits it for non-believers.⁵¹⁹ He notes that just as every action taken in obedience to a command implicitly contains a prohibition, prayers—including funerary prayers—required to be said over a believer imply the impermissibility of saying prayers over nonbelievers. Hence, there is no need to specify that funeral prayer is required for believers.⁵²⁰

Regarding the nature of the obligation itself, most jurists considered funeral prayers to be *farḍ kifāya*.⁵²¹ Ibn Qudāma actually utilizes the same ḥadīth proof-text that Ibn Rushd puts forward to establish a general obligation to perform funeral prayers, but claims it also proves that funeral prayer is a *farḍ kifāya*: “pray upon the one who says there is no deity but God.”⁵²² Ibn Ḥazm narrates a similar ḥadīth, but, like Ibn Rushd, characterizes it as a “general command” to pray over the dead.⁵²³ The ḥadīth recounts the Prophet praying over a deceased man from the Anṣār, then commanding others to

⁵¹⁹ Ibn al-ʿArabī, *Aḥkām*, vol. 2, 559.

⁵²⁰ Ibn al-ʿArabī, *Aḥkām*, vol. 2, 559.

⁵²¹ Abū Bakr al-Shāshī, *Ḥilyat al-ʿUlamāʾ fī maʿrifat madhāhib al-fuqahāʾ*, vol. 1, eds. Saʿid ʿAbd al-Fattāḥ and Faṭḥi ʿAṭiyya Muḥammad (Mecca: Maktabat Nizār Muṣṭafā al-Bāna, 1998), 287; Ibn Ḥazm, *al-Muḥallā*, vol. 8, 20; Qarāfī, *Furūq*, vol. 1, 236; Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 52; Muhammad Qasim Zaman, “Death, Funeral Processions and Articulation of Religious Authority in Early Islam,” *Studia Islamica*, no. 93 (2001), 28.

⁵²² Ibn Qudāma, *al-Kāfī*, vol. 2, 37. It is not immediately clear how this Prophetic statement is indicative of a collective duty, but one might argue that the command to pray over Muslims creates a general obligation, the nature of which is not explicitly individual or collective.

⁵²³ Ibn Hazm, *Muḥallā*, vol. 2, 144.

“pray over your companions, for there is a debt you owe them.”⁵²⁴ However, despite using the proof-text to demonstrate a general obligation, Ibn Ḥazm emphatically notes that with regard to the nature of the duty, there is “no difference of opinion”: it is *kifāya* and once someone undertakes it then the obligation is suspended for everyone else.⁵²⁵ As with *jihād* and other *kifāya*-duties, jurists permit individuals to refrain from performing the funeral prayer as long as someone else fulfills the duty.⁵²⁶

Not all jurists classify funeral prayers as *farḍ kifāya*. The Mālikīs are particularly keen on discussing the issue of how they classify funeral prayers. For example, Qarāfī brings up the topic in a discussion regarding the *kifāya* doctrine (discussed earlier in Chapter One). Specifically, he mentions a hypothetical interlocutor who asks how it is possible, based on the stated rules governing *kifāya* and ‘*ayn* obligations, to consider funeral prayer as a *kifāya* duty?⁵²⁷ The reference to “stated rules” is with regard to distinguishing between types of duties on the basis of whether additional performance of the duty is futile or not. The interlocutor points out that in the *kifāya* context the

⁵²⁴ Ibn Hazm, *Muḥallā*, vol. 5, 115. The Ansār or “helpers” were members of the Aws and Khazraj tribes based in Medina who had converted to Islam and settled Meccan Muslims after they migrated to Medina with the Muḥammad. Jonathan E. Brockopp, “Introduction,” in *The Cambridge Companion to Muḥammad*, ed. Jonathan E. Brockopp (New York: Cambridge University Press, 2010), 8.

⁵²⁵ Ibn Hazm, *Muḥallā*, vol. 2, 144.

⁵²⁶ Zaman, “Death,” 28.

⁵²⁷ Qarāfī, *Kitāb al-furūq*, vol. 1, 237.

benefit of performing a duty cannot be attained again by repeated performance; however, the ‘*ayn*-duty allows for repeated benefits to be acquired through additional performances.⁵²⁸ The specific challenge here is that the benefit one gains from performing funeral prayer is “forgiveness for the deceased” (*al-maghfira li-l-mayyit*), a benefit that we can never know with any certainty has been attained (*wa-lam taḥṣul bi-l-qatʿ*).⁵²⁹ Since one cannot know whether a benefit has been acquired there is still the possibility that additional performance will also produce a benefit. This possibility means that it is more theoretically consistent to include funeral prayer within the ‘*ayn*-category rather than the *kifāya*-category.

In response to the interlocutor’s challenge, Qarāfi agrees that the benefit of funeral prayer can either be “probable” (*ẓannan*) or “certain” (*qatʿan*). The latter is invalid due to its impossibility (*bāṭil al-taʿdhdhur*), so the only possibility is that the benefit is probable.⁵³⁰ Thus, when a group performs the funeral prayer, forgiveness is attained but not with epistemological certainty. However, supplication during the prayer is accepted and, on this basis, Qarāfi says the prayer can be “included” as a *kifāya*-duty (*fa indarajat*

⁵²⁸ Qarāfi, *Kitāb al-furūq*, vol. 1, 237.

⁵²⁹ Qarāfi, *Kitāb al-furūq*, vol. 1, 237.

⁵³⁰ Qarāfi, *Kitāb al-furūq*, vol. 1, 237.

ṣalāt al-janāza fī furūd al-kifāya).⁵³¹ Furthermore, this is the reason one cannot obtain additional benefit from performing another funeral prayer for the deceased: that benefit is premised on the existence of an obligation, which would have already been satisfied. All that remains is the benefit that can be obtained from “repeated supplication” (*takthīr al-du‘ā’*) which, in this case, is gained from continuing to lament the dead (*maṣlaḥa nadbiyya*).⁵³²

On the other hand, Abū Bakr al-Shāshī reports that at least one of Mālik’s companions considered funeral prayer to be a *sunna*, not even a *farḍ*.⁵³³ Shīrāzī provides a possible explanation for this distinction by suggesting that generally funeral prayer is a *kifāya*-duty, but performing it in congregation is *sunna*.⁵³⁴ Ibn ‘Abd al-Barr also acknowledges this difference and tries to explain the nature of the duty to pray over the dead. While he recognizes that most people consider it a *farḍ kifāya*, he notes that others

⁵³¹ Qarāfī, *Kitāb al-furūq*, vol. 1, 237.

⁵³² Qarāfī, *Kitāb al-furūq*, vol. 1, 237. He also notes, with some incredulity, that Shāfi‘ī promotes the idea that funeral prayer cannot be supererogatory and only fulfills an obligation; hence, its performance cannot be repeated.

⁵³³ Shāshī, *Ḥilyat al-‘Ulamā’*, vol. 1, 287.

⁵³⁴ Shīrāzī, *Tanbih*, 35. This distinction implies that a congregation is not a requirement for funeral prayer and, at least in theory, even one individual is sufficient to perform prayer over the deceased. This of course makes sense depending on the context. For instance, one might imagine that premodern travelers encountered situations where they were required to pray over a deceased traveling companion by themselves.

refer to it as a *sunna wājiba ʿalā al-kifāya*.⁵³⁵ In practice, there does not seem to be much difference between these classifications: both permit non-participation as long as others fulfill the duty.⁵³⁶ Even more of an outlier position from the predominant view is that funeral prayer is not legally prescribed in any sense, but rather a *duʿāʾ* or request for forgiveness. Māwardī attributes this position to ʿĀmir b. al-Sharāḥil b. al-Shaʿbī (d. 105/724) and al-Ṭabarī, who apparently believed this was not prayer (*ṣalāh*) because it could be performed without ritual purification. Māwardī himself dismisses this position as a statement that violates consensus (*qawl kharqan*). Furthermore, he points out that the Qurʾān refers to this act as a funeral prayer in Q 9/al-Tawba: 84, thus triggering all pre-conditions for prayer including ritual purity.⁵³⁷ Ibn Rushd notes that some scholars are more forgiving in their analysis of the position as to whether this act is a prayer or not. They interpret the definition as being one that hinges on procedure: unlike daily prayers, in the funeral prayer there is no “bowing or prostration” (*laysa fihā rukūʿ wa-lā sujūd*), so it does not qualify as prayer.⁵³⁸

⁵³⁵ Ibn ʿAbd al-Barr, *al-Istidhkar*, vol. 3, 29.

⁵³⁶ Ibn ʿAbd al-Barr, *al-Tamhid*, vol. 6, 331-332

⁵³⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 52. This relates to what was mentioned earlier about Qarāfī’s position regarding the subsequent performance of funeral prayer for the deceased after the prayer has already been performed once. Unlike Qarāfī though, this position considers even the initial performance of the act to be a *duʿāʾ* and not prayer.

⁵³⁸ Ibn Rushd, *Bidayat*, vol. 1, 47. The discourse on this topic often moves fluidly between the ideas of permissibility, obligation and prohibition. This is best illustrated by the question on funeral prayer

The question also arises as to whether the corpse must be present for the prayer to be validly performed. Ibn Ḥazm says there is an indisputable proof-text (*naṣṣ qāṭiʿ*) on the matter, a prophetic ḥadīth which says you should “pray over your companions” and does not specify whether they need to be present or not. As a result, Ibn Ḥazm says both scenarios are permitted: the presence or absence of the corpse.⁵³⁹ He argues that the obligation for Muslims collectively is to perform prayers for any Muslim who has been buried without a funeral prayer. As evidence he offers the death of the ruler of Abyssinia and the Prophet praying for him in absentia with “four *takbīrs*.” Ibn Ḥazm also cites another tradition on this occasion where the Prophet remarked “today a righteous man from the Abyssinians passed away, so pray for him,” at which point everyone lined up and prayed.⁵⁴⁰ In his view, a consensus exists regarding the occurrence of this prayer in absentia for the Abyssinian ruler and he considers the report to be a *mutawātir* transmission, thus possessing significant authority because considered unassailably

timing: when is it permissible to perform the prayer and when is it prohibited? Ibn Ḥazm says there are three times of day that the Prophet forbade praying over (or burying) the dead: when the sun rises, at midday, and from the point when the sun begins to set until it actually sets. However, he seems to indicate that these times are simply less desirable, as opposed to completely prohibited; the general goal being to encourage people not to delay performance of the prayer. Hence, despite placing various limitations on when burial can take place, Ibn Ḥazm notes that funeral prayers can be performed at all times. Ibn Ḥazm, *Muḥallā*, vol. 5, 114.

⁵³⁹ Ibn Ḥazm, *Muḥallā*, vol. 5, 139.

⁵⁴⁰ Ibn Ḥazm, *Muḥallā*, vol. 5, 139.

authentic. However, despite this, he concedes that while there is a consensus on the details recounted, it may not relate to all the specific ritual details. There are varying degrees of support as both Mālik and Abū Hanīfa consider the act a prayer, but qualify it as specific to the Abyssinian ruler and not a general rule.⁵⁴¹

Ritual Washing

Like prayer, most scholars also agree that ritual washing (*ghusl*) of the dead is a *farḍ kifāya*.⁵⁴² Unlike the obligation to perform funeral prayers, which is tangentially mentioned in the Qurʾān, there is no Qurʾānic reference to ritually washing the deceased.⁵⁴³ However, Kāsānī suggests that proof of the obligation to wash the dead

⁵⁴¹ Ibn Ḥazm, *Muḥallā*, vol. 5, 139.

⁵⁴² For example, Shīrāzī, *Tanbīh*, 35.

⁵⁴³ Of course, this does not mean that it was an unfamiliar concept. In fact, the concept appears historically in other societies. For instance, in Jewish tradition, the body was cleansed, sometimes with the same water infused with spices that had been used in the funeral procession and the *Mishnah* states that the body should be anointed and washed. Jon Davies, *Antiquity*, 105. Typically, there was a ritual bath (*miqveh*) where these funerary rites would take place. Rachel Hachlili, *Jewish Funerary Customs, Practices and Rites in the Second Temple Period* (Leiden: Brill, 2005), 59-60. In ancient Greece, washing the body was often performed by women or sometimes, when it came to be known that death was imminent, by the person dying himself. Robert Gurland, *The Greek Way of Death* (Ithaca: Cornell University Press, 2001), 24. Interestingly, in Jewish tradition, burial of the dead is a duty, but is also a contaminating activity that requires anyone who touches the body to purify themselves subsequently. Hachlili, *Jewish Funerary Customs*, 487. That said, some scholars believe that the Islamic funeral “came to differ significantly from the funerals and social norms of the Jews, Christians and Zoroastrians who inhabited the world of Islam.” Leor Halevi, *Muhammad’s Grave: Death Rites and the Making of Islamic Society* (New York: Columbia University Press, 2007), 3. For a more detailed look at the Christian, Jewish and Zoroastrian contexts, see Halevi, *Muhammad’s Grave*, 76-83.

comes from both text (*ḥadīth*) and consensus (*ijmāʿ*). He specifically mentions the Prophetic saying that “there are six rights that a Muslim is owed by another Muslim” and one of those rights is to be washed after dying.⁵⁴⁴ Ibn Qudāma also relates a ḥadīth that mentions a man who was crushed to death by his she-camel and the Prophet ordered people to “wash him with water and lotus leaves.”⁵⁴⁵ Māwardī cites a Prophetic ḥadīth regarding the collective nature of ritual washing: “it is obligatory for my community to wash their dead...”⁵⁴⁶ He notes there are three types of ritual bathing, two of which are individual obligations while the third is communal. The communal one is for the dead and is a duty collectively owed by all Muslims (*faraḍa ʿalā kāffat al-Muslimīn wa-l-kull bihi mukhāṭabūn*).⁵⁴⁷ Māwardī indicates that these obligations, collective and individual, start off the same, but diverge when it comes to performance (*furūḍ al-kifāyāt wa-furūḍ al-aʿyān qad yashtarikān fī al-ibtidāʾ wa-yaftariqān fī al-fiʿl*).⁵⁴⁸ This is a common way of conceptualizing the relationship between collective and individual obligations. In general, every obligation begins as an individual obligation that must be performed. If the act is never performed then everyone is held liable for it. The difference between

⁵⁴⁴ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 299

⁵⁴⁵ Qudāma, *al-Kāfī*, vol. 2, 11.

⁵⁴⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

⁵⁴⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

⁵⁴⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

collective and individual obligations is that with individual obligations a person continues to be liable until they themselves perform, while for collective duties liability disappears once performance is initiated by anyone.

Regarding the nature of the obligation, similar debates on classification occur that were discussed in the context of funeral prayers. For instance, Mālikī jurists apply their distinction between *farḍ kifāya* and *sunna ʿalā al-kifāya* to the context of ritual washing as well. Ibn Rushd notes that both classifications exist within the Mālikī school and suggests the reason for this is that the concept has been transmitted by communal practice (*ʿamal*) as opposed to verbal statements (*qawl*). Communal practice contains no signifier to explain the obligation (*wa-l-ʿamal laysa lahu ṣīghah tufahhim al-wujūb aw-lā tufahhimuhu*).⁵⁴⁹ He illustrates the difference between these classifications through a Prophetic statement, relayed by Qāḍī ʿAbd al-Wahhāb (d. 422/1031), which discusses the procedure for a ritual washing of one’s daughter upon her death: “wash her three times or five times.”⁵⁵⁰ One opinion is that this statement arose as a lesson to describe one way of washing the deceased, but not as a command entailing an obligation that it only be

⁵⁴⁹ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 226, 164.

⁵⁵⁰ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 226, 164.

done in this way. Another opinion says that a command is contained within this statement and the description indicates that this must be treated as an obligation.⁵⁵¹

Shrouding

While funeral prayer and ritual washing are the primary acts in the funeral rites, shrouding is also of considerable importance. As with other duties, there is no Qur'ānic reference to shrouding, however, scholars generally consider it obligatory and some claim there is consensus on this.⁵⁵² Ibn Ḥazm states that shrouding is obligatory for both male and female Muslims.⁵⁵³ He stresses the importance of shrouding by requiring it even be performed for people who have already been buried without being washed or shrouded; they are to be exhumed, washed, shrouded and reburied.⁵⁵⁴ Ibn Qudāma notes that shrouding the deceased is a *kifāya* act and “forgoing it is an outrage on decency” (*fī tarkihā hatkan li-hurmatihā*).⁵⁵⁵ Kāsānī speaks about shrouding as a *sunnah muṭlaqah* that has the legal force of the obligatory (*wājib*).⁵⁵⁶ He says that the nature of the obligation is

⁵⁵¹ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 226, 164.

⁵⁵² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20; Ibn Ḥazm, *Muḥallā*, vol. 5, 113.

⁵⁵³ Ibn Ḥazm, *Muḥallā*, vol. 5, 113.

⁵⁵⁴ Ibn Ḥazm, *Muḥallā*, vol. 5, 114.

⁵⁵⁵ Ibn Qudāma, *al-Kāfi*, vol. 2, 55.

⁵⁵⁶ This is the same term he used to refer to ritual washing. See, *supra* p. 1.

“along the lines of *kifāya*” and “fulfills the rights of the dead.”⁵⁵⁷ Māwardī says that the “consensus” opinion is on the general idea that shrouding the deceased is an obligation (*wājib*). He argues that common practices related to shrouding (*jarā al-ʿamal*) are, however, simply *sunna*.⁵⁵⁸

Jurists also discuss what obligations exist regarding the cloth used to shroud. For instance, there are different opinions on the number of sheets of cloth necessary for the deceased. Māwardī cites an opinion which requires only one piece of cloth, of sufficient length: any additional pieces are optional.⁵⁵⁹ He does acknowledge that the common practice is to use three pieces of cloth, but suggests this is a choice, not an obligation.⁵⁶⁰ Māwardī arrives at this conclusion despite noting a widely reported ḥadīth, from ʿĀ'isha, that the Prophet was buried in three pieces of cloth of one kind of thread, with no shirt and no turban. The report is not enough for him to classify this as an obligation as

⁵⁵⁷ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 299.

⁵⁵⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20.

⁵⁵⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 30. The practice of shrouding the dead is evidenced as early as the Epic of Gilgamesh and was also a “standard part of Persian, Greek and Hellenistic prothesis.” Jon Davies, *Antiquity*, 15. In fact, “nearly all cults and religions” from that period agreed on the “paramount importance of formally disposing of the dead, of providing special burial clothes, a shroud at least.” Jon Davies, *Antiquity*, 64. The ancient Greeks also required only a single piece of cloth that could be either bier-cloth, shroud or mantle. Gurland, *Greek Way*, 24. There was no burial in Zoroastrian teaching because of the belief in the corpse being left exposed to nature. Jon Davies, *Antiquity*, 66.

⁵⁶⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20.

opposed to a choice.⁵⁶¹ Māwardī also cites Shāfi‘ī as saying that being buried in five pieces of cloth is permissible, but as an absolute limit.⁵⁶² However, despite discussing the number of pieces required for the shroud, Māwardī stresses that the key requirement is for the deceased’s nakedness to be covered based on the principle that “what is obligatory after death is what was obligatory before it” (*li-annahu yajib min sitrihi ba‘d mawtihi mā kāna yajib min sitrihi qabl mawtihi*).⁵⁶³

Picking up on this last point, Ghazālī does not set the obligation on the basis of the number of pieces of cloth, but rather what coverage the cloth provides. He sets the requirement at the least amount of cloth needed to cover the entire body.⁵⁶⁴ Similarly, Ibn Ḥazm notes that the shroud must be of “sufficient length” to cover the deceased.⁵⁶⁵ For men he says this is “three pieces of cloth,” and no shirt, turban or under garments.⁵⁶⁶ Like Māwardī, Ibn Ḥazm also relies on the above cited ḥadīth by ‘Ā’isha.⁵⁶⁷ Ibn Ḥazm

⁵⁶¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20. Interestingly, Māwardī reports a dispute on this point from the eponyms of two legal schools, Mālik and Abū Ḥanīfa. For his part, Mālik chose a turban for deceased men and women while Abū Ḥanīfa chose to have the deceased wear a shirt. Mālik relies on the fact that this was a practice of the people of Medina. In fact, he notes that ‘Alī b. Abī Ṭālib had a turban on when he was buried. Māwardī rejects both these opinions on the basis of ‘Ā’isha’s ḥadīth. Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20.

⁵⁶² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20.

⁵⁶³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20.

⁵⁶⁴ Ghazālī, *al-Wasīṭ*, vol. 2, 370.

⁵⁶⁵ Ibn Ḥazm, *Muḥallā*, vol. 5, 113.

⁵⁶⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 117-119.

⁵⁶⁷ Ibn Ḥazm, *Muḥallā*, vol. 5, 118.

places similar requirements on cloth for deceased women, but says there should be two additional pieces (a total of five) of cloth. If even this is insufficient to completely cover the deceased woman's body then more cloth can be used.⁵⁶⁸ Contrary to a widely held position prohibiting the use of stitched garments for the shroud, Ibn Qudāma argues that the best option is to bury people in a long shirt (*qamīṣ*) as opposed to any other type of wrapping.⁵⁶⁹ He permits shrouding with two long pieces of cloth or, citing Awzā'ī, even one piece of cloth as long as it covers the entire body.⁵⁷⁰ Some scholars also permit modifying the obligation based on availability of material. As in other areas of Islamic law, the doctrine of necessity relaxes the requirements. As a result, Ibn Ḥazm states that if only one piece of cloth is found for two people then they should be shrouded together in one cloth (*fa-in lam yujad li-l-ithnayn illā thawb wāḥidan darjan fihi jamī'an*).⁵⁷¹ Furthermore, despite the requirement that men and women should be fully covered by the shroud, in this scenario he says there is “no harm” if they are shrouded in “less.”⁵⁷² To support this view he reports that when Muṣ'ab b. 'Umayr died at Uḥud there was not

⁵⁶⁸ Ibn Ḥazm, *Muḥallā*, vol. 5, 118-119.

⁵⁶⁹ Ibn Qudāma, *al-Mughnī*, vol. 3, ed. 'Abd Allāh b. 'Abd al-Muḥsin al-Turkī and 'Abd al-Fattāḥ Muḥammad al-Ḥilwa (Riyadh: Dār 'Ālam al-Kutub, 1997), 386.

⁵⁷⁰ Ibn Qudāma, *al-Mughnī*, vol. 3, 386.

⁵⁷¹ Ibn Ḥazm, *Muḥallā*, vol. 5, 118. It is not clear whether Ibn Ḥazm requires this to be two people of the same gender or whether he would permit two spouses to be buried together.

⁵⁷² Ibn Ḥazm, *Muḥallā*, vol. 5, 118.

enough cloth to cover both his head and his legs. As a result, the Prophet required the head to be covered all the way down to his legs such that Muṣ‘ab’s private parts were completely covered.⁵⁷³

The type of cloth used for the shroud must also follow certain guidelines. Ghazālī states that “silk is forbidden” for men and “not recommended” for women because of its association with “opulence.” Instead, the preferred material is either cotton (*qūṭn*) or linen (*kattan*).⁵⁷⁴ In line with this, Ibn Ḥazm says the shroud must be of “good quality,” citing a Prophetic ḥadīth that if you “shroud your brother then shroud him well.”⁵⁷⁵ In fact, he mentions a report that Ibn Mas‘ūd bequeathed 100 dirhams towards a fine quality shroud.⁵⁷⁶ At the same time, Ibn Ḥazm is clear that the “expense” of a shroud is not the sole factor determining whether it is “good quality” or not.⁵⁷⁷ In fact, he clarifies that if

⁵⁷³ Ibn Ḥazm, *Muḥallā*, vol. 5, 118.

⁵⁷⁴ Ghazālī, *al-Wasīṭ*, vol. 2, 370. There is also discussion of some “preferences” relating to the shroud, for instance its color should be white. Ibid. There seemed to be a divergence between jurists who argued for a simple shroud of white and others who allowed for more luxury in death, possibly reflecting a division between audiences of ascetic and merchant Muslims. Halevi, *Muhammad’s Grave*, 95-96.

⁵⁷⁵ Ibn Ḥazm, *Muḥallā*, vol. 5, 113.

⁵⁷⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 113. Interestingly, the ancient Greeks also stipulated restrictions on the cost of the shroud with some laws placing a limit of 300 drachmas and others restricting the expenditure to 35 drachmas. Gurland, *Greek Way*, 25-26.

⁵⁷⁷ Ibn Ḥazm, *Muḥallā*, vol. 5, 113.

the shroud is simply extravagant, not only does it fail to satisfy the shrouding obligation, but it is disliked in itself.⁵⁷⁸

Furthermore, Ibn Ḥazm notes that it is not permissible to bury someone in cloth that they were not allowed to wear when they were alive. This includes silk, clothes tinged with a gold color (*mudhahhab*) or those containing red-dye (*mu‘aṣfar*). Of course, he makes clear that since these are permissible for women to wear when they are alive, they are all permissible for a woman’s funeral shroud.⁵⁷⁹ This reference to what was done when the person is alive is a common theme for jurists as they seek symmetry between life and death, a point we will return to later. In a related discussion on extravagance, there is also discussion on whether it is obligatory to put scent (*ḥunūt*) on the deceased. Māwardī notes an opinion that says it is obligatory just like the shrouding. Another opinion says it is not obligatory because “smelling sweet in life is not obligatory” (*ṭīb al-ḥayy ghayr wājib*) so it is not obligatory in death either.⁵⁸⁰ Regarding the color of the shroud cloth, there is a general preference for white. Ghazālī does not explicitly obligate

⁵⁷⁸ Ibn Ḥazm, *Muḥallā*, vol. 5, 114. On a related note, there is also discussion on where to place the obligation to pay for the shroud of indigent individuals who pass away. Ghazālī notes that if these individuals have wealth, then it must be utilized for the shroud. Likewise, their estate or wealthy spouses are responsible for the shroud. However, if none of these options exist for them then their shroud will be paid for from the state treasury. See, Ghazālī, *al-Wasīṭ*, vol. 2, 371.

⁵⁷⁹ Ibn Ḥazm, *Muḥallā*, vol. 5, 122.

⁵⁸⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 30.

the use of white cloth, but states that it is “God’s preferred” color (*aḥabb al-thiyāb ilā Allāh al-bayḍ*).⁵⁸¹ Māwardī gives a choice with regard to the color of the shroud, but also indicates a preference for white.⁵⁸² As support for this position he notes that both the Prophet and the Prophet’s uncle, Hamza, were buried in white cloth.⁵⁸³ While Ibn Ḥazm also notes a preference for white, he rejects the idea that it is obligatory to wear white since the Prophet wore other colors during his lifetime.⁵⁸⁴

Carrying and Burying

The final category of funeral rites comprises carrying the body towards the gravesite and the actual burial. Unlike the other funerary duties, there is slightly more variation in the scholarly opinions regarding the legal nature of these last two rites. The prevalent position among most jurists is that this is also an obligation and is *kifāya*. However, many do not merge carrying and burial as part of the same obligation. In discussing carrying the body to the funeral or walking to the funeral, jurists tend not to

⁵⁸¹ Ghazālī, *al-Wasīṭ*, vol. 2, 370. Interestingly, this also seems to be the preference in Jewish tradition and ancient Greece. White was the “usual” color of the Greek shroud although there was differentiation in color based on the status of the dead. Gurland, *Greek Way*, 24-25. In Jewish tradition, the body would be dressed in white linen that lacked ornamentation. Jon Davies, *Antiquity*, 105.

⁵⁸² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20.

⁵⁸³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 20 (Prophet’s shroud) and 35 (Hamza shroud).

⁵⁸⁴ Ibn Ḥazm, *Muḥallā*, vol. 5, 118.

elevate it to the level of a legal duty. Ibn Rushd states that this is only a *sunna* and does not include it within the category of funeral obligations.⁵⁸⁵ Māwardī supports this position generally, citing Shāfi‘ī’s statement that there is “no requirement to carry the deceased to burial,” but that it is permissible to do so.⁵⁸⁶ That said, despite not being required, when the deceased is carried to the grave Māwardī includes stipulations on who is permitted to carry the deceased and who is not, specifically noting that only men should carry the corpse regardless of whether it is a male or female body.⁵⁸⁷ As with the earlier funeral rites, Ibn Qudāma introduces a different position on this matter in comparison to other jurists, possibly indicative of a broader dissenting Ḥanbalī posture on funeral rites. In his view, in addition to the burial itself, the act of carrying the dead to be buried is also a *kifāya*-duty that must be performed.⁵⁸⁸

On the other hand, Shīrāzī only considers burying someone as a *kifāya*; he does not mention carrying them to be buried as a similar type of obligation.⁵⁸⁹ The same position is held by Ghazālī, Māwardī, and Ibn Ḥazm.⁵⁹⁰ Ibn Rushd goes so far as to argue

⁵⁸⁵ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 233.

⁵⁸⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 40.

⁵⁸⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 40.

⁵⁸⁸ Ibn Qudāma, *al-Kāfi*, vol. 2, 55.

⁵⁸⁹ Shīrāzī, *Tanbih*, 36.

⁵⁹⁰ Ghazālī, *al-Wasīṭ*, vol. 2, 388; Ibn Ḥazm, *Muḥallā*, vol. 5, 116; Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 24.

for a consensus regarding the obligation to bury the dead, indicating that the obligation has its origin in two Qurʾānic verses: Q 77/al-Mursalāt: 25-26 and Q 5/al-Māʾidah: 31.⁵⁹¹ Of course, he recognizes that consensus on obligating burying the dead does not indicate consensus on *every* aspect of the burial. Jurists often disagree on details such as whether anything can be built on top of the grave (i.e. a gravestone or something more elaborate) or what materials can be used for the gravesite.⁵⁹² However, these aspects tend to be discussed alongside the corresponding prohibitions that may be associated with the main obligatory act.⁵⁹³ Like Ibn Rushd, Māwardī also speaks of the obligation originating with the story of Cain and Abel recorded in Q 5/al-Māʾidah: 31.⁵⁹⁴ One aspect of the burial that jurists discuss as part of the obligation relates to the depth of the grave. Ibn Ḥazm

⁵⁹¹ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 244. The first verse, Q 77/al-Mursalat: 25-26, states: “Did We not make the earth a home, for the living and the dead?” The second verse, Q 5/al-Māʾidah: 31, relates to the story of the Prophet Adam’s sons [Cain and Abel], one of whom killed the other: “God sent a raven to scratch up the ground and show him how to cover his brother’s corpse and he said, ‘Woe is me! Could I not have been like this raven and covered up my brother’s body?’ He became remorseful.”

⁵⁹² Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 244. Other examples include whether the grave can be pargeted (*tajšīš al-qubūr*), writing on the grave (*al-kitābah ʿalayhā*), sitting on it (*al-julūs ʿalayhā*) to relieve oneself. Ibid.

⁵⁹³ Another example of prohibitions associated with obligatory funeral acts is that of timing. For instance, Ibn Ḥazm lays out some very specific times as to when burial is not permitted except out of necessity. For instance, he says that it is not permissible for anyone to be buried at night, at sunrise or when the sun is starting to set. Ibn Ḥazm, *Muḥallā*, vol. 5, 114. Anticipating a criticism of this viewpoint, Ibn Ḥazm relates the fact that the Prophet himself, his wives and various Companions were buried at night, but all of these were done out of necessity (*li-ḍarūra awjabat*). Ibid. In order to support his position further Ibn Ḥazm cites the authority of Saʿīd b. al-Musayyab who had a noted dislike of burials taking place at night. Ibn Ḥazm, *Muḥallā*, vol. 5, 115.

⁵⁹⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 24.

discusses the fact that digging a deep grave (*i‘māq ḥafīr al-qabar*) is obligatory and it is permissible to bury one, two or three bodies in a single grave.⁵⁹⁵ Māwardī also states that “if burying the dead is obligatory then one must choose the [appropriate] depth of the grave.”⁵⁹⁶ Ghazālī provides additional guidance that the hole should be large enough to conceal the body, cover the corpse’s smell and protect the body from birds of prey.⁵⁹⁷

Exceptions to the Standard Duties

Having outlined general guidelines for the duties to the dead, the remainder of this chapter investigates how jurists navigate what they consider to be “exceptional” circumstances that arise in the context of death. Specifically, this section examines the categories of individuals whom jurists place outside the default status of free, mature, sane, law-abiding Muslim males who did not die while engaged in warfare. These exceptional individuals are addressed in their capacity as deceased to whom duties *might* be owed. For purposes of clarity, I divide them into six broad categories: women, children, sinners, disbelievers, strangers and combatants. Each category contains some “deficiency” in comparison to the default. For women, jurists create distinctions in the

⁵⁹⁵ Ibn Ḥazm, *Muḥallā*, vol. 5, 116.

⁵⁹⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 24.

⁵⁹⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 388.

performance of each of the four funeral rites, altering the associated duties because either the deceased or performer of the funeral rite is a woman. The second category are children, or more broadly speaking the morally “blameless.” Jurists are concerned with individuals who lack the requisite maturity to be culpable for their actions and how this impacts the funerary duties owed to them or their own performance of these duties for others. The third category are sinners, consisting of four types: hypocrites, criminals, suicides and rebels. The fourth category are nonbelievers, primarily those with kinship ties to Muslims either through marriage or blood and the extent of performance required of or for them. The fifth category are strangers, usually individuals whose identities are unknown for one reason or another, such as travelers in foreign territory or even unidentified limbs found on the battlefield. The final category are fighters participating in war, but also bystanders to war and those distant from the battle. On its face, the level of involvement in hostilities determines the extent of rites performed upon them.

The discussions of these exceptional categories of persons has to be read in light of the default positions discussed above, where the basic obligations are outlined; here the question is how and when departures from those obligations arise. However, there is a larger objective for jurists, particularly in determining who is *not* entitled to receive funeral rites or perform them: crafting the boundaries of the moral community. The very

fact that there are Islam-specific final rites suggests that performance of these duties is a lasting statement of the inclusion (or exclusion) of the deceased within the moral community. The discourse on these funerary duties navigates significant theological questions of what actions or circumstances are disqualifying. Of course, as with other duties, alongside determining the contours of the moral community, jurists are also addressing functional questions on how these duties should be performed and what conditions might excuse aspects of the performance without giving rise to any inference that the deceased might be excluded from the community.

Women

In general, funeral rites for women mirror those of men, but with certain dispensations to account for matters of modesty. Most of the discussion centers on who is permitted to perform the obligatory funeral rites upon women, as opposed to the affirmative duties required of women. For the most part, funeral rites are performed exactly the same for women as they are for men, especially funeral prayers and burying the deceased.⁵⁹⁸ Jurists outline different requirements for women almost exclusively in the context of ritual washing, and, to a lesser degree, shrouding. Their concern here is

⁵⁹⁸ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

twofold. First, they are broadly interested in preserving modesty between the sexes even at the time of death; that issue does not come up with prayer or burial in any significant way.⁵⁹⁹ Second, jurists insist on maintaining a degree of symmetry between the rites performed at death and analogous rules for the living. For example, they argue that because there is no difference in *how* men and women pray while they are alive, there is no difference in *how* the genders perform funeral prayers over them.⁶⁰⁰ On the other hand, since living women are required to have more extensive covering of their bodies, as compared to living men, jurists require their funeral shrouding to also be more extensive. Ibn Qudāma states this outright, noting that there is a strong preference that a deceased woman be covered with five pieces of cloth because they have more private areas to conceal while they are alive and so must do the same in death. He suggests a general principle that differentiation in dress at the time of death should be similar to differentiation when alive.⁶⁰¹ Māwardī echoes this principle of modesty, extending the

⁵⁹⁹ This is not to say that modesty concerns or the desire to analogize do not arise in the context of funeral prayers as well, specifically regarding the makeup of the congregation performing the prayer. Māwardī notes that if a man dies somewhere and there are only women around, then they should pray individually without a prayer leader because women are not allowed to lead men in prayer, although he notes that Shāfi‘ī explicitly allows them to pray in congregation. On the other hand, if the deceased is a woman and there are only women who can pray over her then they should pray in congregation because it is permissible for women to lead other women in prayer. Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 58. *See also*, Halevi, *Muhammad’s Grave*, 52-64.

⁶⁰⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 58.

⁶⁰¹ Ibn Qudāma, *al-Mughnī*, vol. 3, 391.

default position that the shroud should cover the deceased's "entire body" by stating that, in the context of women, "entire body" is more extensive and means everything "except their face and hands."⁶⁰²

Regarding ritual washing, the main concern is whether a man can wash a deceased woman, and vice versa. Jurists are sensitive about the idea of men and women, especially those who are not related, seeing each other naked.⁶⁰³ The discourse typically begins by considering whether someone is permitted to wash their spouse. Māwardī's position is in the affirmative, pointing to the precedent set by the first caliph, Abū Bakr b. Siddīq, who was washed by his wife upon his death.⁶⁰⁴ That said, Māwardī recognizes that differences of opinion exist on this point outside of the Shāfi'is, his own school, and the Mālikīs. These differences are based on the fact that the Prophet never washed any of his wives who passed during his lifetime.⁶⁰⁵ As a result, both Abū Ḥanīfa and Sufyān al-Thawrī do not allow spouses to wash each other.⁶⁰⁶ However, Māwardī counters this opinion with a narration from 'Ā'isha that the Prophet told her "if you die before me

⁶⁰² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 28.

⁶⁰³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 228.

⁶⁰⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 16.

⁶⁰⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 16.

⁶⁰⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 16.

then I would wash you and shroud you.”⁶⁰⁷ In addition, he mentions Asmā’ b. ‘Umayy’s narration that Fāṭima was washed by ‘Alī and no Companion objected to this. For Māwardī this by itself is proof of consensus on the issue.⁶⁰⁸

Ibn Ḥazm picks up this issue by first stating broadly that it is “obligatory to wash a male and female Muslim,” noting that this was the opinion of both Shāfi‘ī and Dāwūd. He points to when the Prophet’s daughter died and he told people to wash her three or five times. For Ibn Ḥazm this is indicative of the fact that there is no difference between men and women when it comes to washing the dead (*ḥukm al-rajul wa-l-mar’ah fī dhālīka siwā’*) and ridicules those who claim that it is not obligatory for women.⁶⁰⁹ Kāsānī supports this position, noting that the “ruling on [the steps involved in] washing [the dead] is the same for women as it is for men” (*wa-ḥukm al-mar’ah fī al-ghusl ḥukm al-rajul*). He argues for symmetry between life and death: ritually washing the deceased must include the same elements as ritual washing when they were alive because both are pre-conditions for prayer. The deceased is thus considered a participant in the funeral prayer and so must fulfill the pre-requisites for a valid prayer, which includes ritual purity. Hence, there is no distinction in the sequence of body parts that are washed for a

⁶⁰⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 16.

⁶⁰⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 16.

⁶⁰⁹ Ibn Ḥazm, *Muḥallā*, vol. 5, 113.

deceased man versus a deceased woman because no distinction exists when they are alive.⁶¹⁰ To this end, Kāsānī does promote a level of modesty between the genders noting that “each gender should wash itself” (*al-jins yughassil al-jins*) such that men wash men and women wash women. He bases this on the fact that, when a person is alive, “a non-lustful touch is permitted within a gender” and so should be “permitted after death.”⁶¹¹ Along these lines, Ghazālī also allows any man to wash another man, or any woman to wash another woman, but says the opposite sexes cannot wash each other unless they are married or closely related (*maḥram*).⁶¹² In those situations where a woman dies with only a non-relative male present or a man dies with only a non-relative female present, Ghazālī permits the washing by whoever is present as long as they “lower their gaze.”⁶¹³ He applies the same for cases involving the hermaphrodite (*khunthā*), whose washing can

⁶¹⁰ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶¹¹ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302. This is also the view held by Ibn Rushd. See, Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240.

⁶¹² Ghazālī, *al-Wasīṭ*, vol. 2, 366. The one additional exception he makes in this context is with regard to slaves. Ghazālī notes that a master is permitted to wash his slave, whether female or male. He then asks whether the opposite is permissible? Here he notes two opinions. The first says, yes, it is permissible for the right-hand possession (a Qurʾānic euphemism for slave-ownership) to wash the master just as it is permissible for the wife to do so. The second position says no, because once death occurs the slave is emancipated from the master, often passed on in the inheritance, and they become strangers. As a result, the rule regarding non-related individuals becomes operative. Ghazālī, *al-Wasīṭ*, vol. 2, 366.

⁶¹³ Ghazālī, *al-Wasīṭ*, vol. 2, 366.

be done by either a man or a woman “based on what gender was established for them in infancy” (*istiṣhāban li-ḥukm al-ṣighar*).⁶¹⁴

The one requirement that Ghazālī applies here is that in scenarios involving non-relatives, the washing should be done *without* water; instead, *tayammum* should be performed because the lack of a *maḥram* to fulfill the obligation is analogous to the lack of water for ritual washing.⁶¹⁵ Consistent with his position on analogies generally, Ibn Ḥazm also disagrees with this analogy to *tayammum*. Instead, he notes that where there are only non-relative men or women present with the body of the opposite sex, water should be used but the body should be covered with a thick (*kathīf*) garment. The washers should pour water over the entire body without using the hands to touch the body directly. Unlike Ghazālī, he believes *tayammum* is only possible when water is actually

⁶¹⁴ Ghazālī, *al-Wasīṭ*, vol. 2, 366. Paula Sanders argues that in reviewing medieval Islamic legal texts there is not “even the slightest suggestion that a *khuntha* is both a man and a woman.” For medieval Islamic jurists, “human beings had to be either male or female; sometimes they seemed to be neither, but they could not be both.” Paula Sanders, “Gendering the Ungendered Body: Hermaphrodites in Medieval Islamic Law,” in *Women in Middle Eastern History: Shifting Boundaries of Shifting Boundaries in Sex and Gender*, ed. Nikki R. Keddie and Beth Baron (New Haven: Yale University Press, 1991), 77. As a result, jurists were concerned with assigning a sex to a child who had both sexual organs and the general rule was to assign sex based on the urinary orifice (*al-ḥukm li-l-mabal*), a “pre-Islamic Arabian custom.” Sanders, “Gendering,” 77. There were also rare circumstances where a child passed puberty without having their sex determined (*khuntha mushkil*) and at this point a “gendering” process had to take place to assign the appropriate rules for socialization. For our purposes, “determining sex was important because the relationships of the living to the *khuntha* were not altered by the fact of death.” Sanders, “Gendering,” 82.

⁶¹⁵ Ghazālī, *al-Wasīṭ*, vol. 2, 367. Shāshī reports that there are two opinions in this regard. The first says that you should perform *tayammum* as Ghazālī notes, and this was the opinion held by Mālik and Abū Ḥanīfa. The second opinion is more in line with Ibn Ḥazm’s. Shāshī, *Ḥilyat al-‘Ulamā’*, vol. 1, 284.

absent.⁶¹⁶ Ibn Muflīḥ potentially requires less physical contact between the washer and the deceased than exists through use of *tayammum* or covering the body with a thick garment. Instead, he requires that when a man dies surrounded only by women, or vice versa, or in the case of hermaphrodites, the washing should be carried out with a barrier.⁶¹⁷ He makes no mention of using one's hands at all. In fact, Ibn Muflīḥ says that even in cases where no barrier is warranted, for instance with *maḥram* relations of the opposite sex, the body should still be washed without touching and with a shirt covering the corpse.⁶¹⁸ Ibn Qudāma states that there is consensus (*la khilāf*) that a woman is allowed to wash her deceased husband.⁶¹⁹ However, the reverse, where a man washes his deceased wife, is permitted by some jurists and prohibited by others.⁶²⁰ Of course, regarding the actual procedure for washing, that remains unchanged for all the funeral rites except shrouding. Ibn Qudāma says this mirrors the situation of living men and

⁶¹⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 176. This is not surprising since, as a Ṣāḥirī, Ibn Ḥazm rejected legal reasoning by analogy. For Ibn Ḥazm, “analogical reasoning violates the principle of certainty,” which was “fundamental” to Ibn Ḥazm’s concept of Sharī‘a. Adam Sabra, “Ibn Ḥazm’s Literalism: A Critique of Islamic Legal Theory (I),” *Al-Qanṭara*, vol. 28, no. 1 (July 2007).

⁶¹⁷ Ibn Muflīḥ, *Kitāb al-Furū‘*, vol. 3, 293.

⁶¹⁸ Ibn Muflīḥ, *Kitāb al-Furū‘*, vol 3, 293.

⁶¹⁹ Ibn Qudāma, *al-Kāfi*, vol. 2, 12.

⁶²⁰ Ibn Qudāma, *al-Kāfi*, vol. 2, 12.

women: there is no difference in how they bathe, but there is a difference in how they must dress.⁶²¹

Children

The second category of exceptions discussed is children. For jurists, children present a number of interesting questions beginning with their status as inculpable actors and how this impacts duties that are owed to them (or that they owe to others). The question that seemed to preoccupy jurists the most in the context of funeral rites for children was determining the exact moment of their death. In particular, they were concerned with ascertaining whether the child “lived” post-birth or not and, if he did, for how long. As a result, they create two broad categories of deceased children: pre-birth (intra-uterine fetal death) and after birth (neonatal death). These categories determined which funerary duties are performed on the child and the exact nature of those duties.

The primary inquiry jurists make is ascertaining the length of the child’s life starting with conception. Through prooftexts in the Qur’ān and the ḥadīth, jurists construct a framework of rules (including what factors signify life), which change the

⁶²¹ Ibn Qudāma, *al-Mughnī*, vol. 3, 391.

duties owed to the child on the basis of how long they were “alive.” A tangential insight gained from their discussion on children is the hierarchy jurists read into the duties owed at death. They contemplate scenarios where not all the funerary duties will be performed, with some duties having a higher priority in comparison to others.⁶²² Within this hierarchy, funeral prayer is an important indicator of what duties will be performed since it is ordinarily the duty with the highest priority of performance. Hence, if jurists require the performance of funeral prayer it usually signals that all other duties must be performed as well. After prayer, ritual washing of the deceased also indicates that both shrouding and burial must take place, but may not necessarily signify anything about whether funeral prayer should be performed or not. In other words, it has a lower priority of performance than prayer. Shrouding and burial have comparatively fewer restrictions since they function as basic obligations owed to the deceased.

With the above in mind, in the context of children, premodern jurists centered “proof of life” on a few different factors, but the most important seems to be whether the child made any type of sound subsequent to birth. Ibn Rushd reports that both Mālik and Shāfi‘ī prohibit prayer over a child until it makes a sound (*la yuṣallā ‘alā al-ṭifl ḥattā*

⁶²² For example, Ghazālī explicitly suggests as much when he says that complete shrouding is not necessary except if prayer is obligatory. Ghazālī, *al-Waṣīṭ*, vol. 2, 376.

yastahilla šārikhan).⁶²³ Māwardī provides further explanation of Shāfi‘ī’s position that obligates prayer over a deceased child only if it makes a sound after birth. He notes that Shāfi‘ī discusses deceased children under a broad term: *al-siqṭ*. This term is used by jurists to cover a range of pediatric deaths, including miscarriages, stillbirths and infants who die shortly after birth.⁶²⁴ For his part, Shāfi‘ī focuses his discussion solely on neonatal death (shortly after birth) and stillbirth.

For children who die after birth, Shāfi‘ī considers it sufficient proof of life that the child makes a sound, thus entitling it to have the same funerary duties performed on its behalf as an adult: prayer, washing, shrouding and burial.⁶²⁵ Māwardī contends that “all jurists” (*kāffat al-fuqahā*) agree on this position except Sa‘īd b. Jubayr who prohibits performing funeral prayers in these circumstances, even if the child lives for a significant period after birth.⁶²⁶ Sa‘īd b. Jubayr bases this on a report that the Prophet never performed funeral prayers for his son Ibrāhīm, who died at 16 months (or 18 months) after birth.⁶²⁷ In addition, he reasons that prayer is meant as an intercession and

⁶²³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240. There are also other factors that some jurists use like the divine spirit being blown into the child. Māwardī reports that Abū Ḥanīfa and Ibn Abī Laylā only allow the child to be prayed over if the spirit (*ruh*) has been blown into it, in other words, if the mother’s pregnancy was past the first trimester. Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240.

⁶²⁴ There does not seem to be a single English word that encompasses the breadth of the term *al-siqṭ*.

⁶²⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 30.

⁶²⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 30.

⁶²⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

invocation (*shafā'ah wa-du'ā'*) for the forgiveness of people's sins and shortcomings; however, this is pointless for a child who has no sin and whose shortcomings are already forgiven.⁶²⁸ Māwardī counters this position by citing a contrary report indicating support from the Prophet for the obligation to pray over the child if it makes a sound before dying. Specifically, he mentions a ḥadīth from Ibn 'Abbās that the Prophet said “if a newborn makes a sound then the child [is entitled to] inherit and give inheritance, so pray over the child [if it subsequently dies].”⁶²⁹ As noted earlier, the requirement to perform funeral prayers signals the requirement for all other “lesser” rites also to be performed. Māwardī considers it obligatory to treat this situation as analogous to praying over someone who commits a major sin, an issue taken up later in this chapter.⁶³⁰

Furthermore, Māwardī also directly addresses the tradition that Sa'īd b. Jubayr mentions and suggests that the issue is simply a misinterpretation of the report's meaning. He reconciles the potentially conflicting reports by arguing that the fact that the Prophet did not pray over Ibrāhīm simply means that he did not *personally* lead the prayer.⁶³¹ This was because at the time of Ibrāhīm's passing the Prophet was preoccupied

⁶²⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶²⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶³⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶³¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31. Likewise, with regard to those who say that the Prophet prayed over Ibrāhīm, Māwardī says they actually mean that the Prophet *ordered* prayers to be said over Ibrāhīm,

with a rare event: a lunar eclipse and the prayer that accompanies it (*ṣalāt al-khusūf*).⁶³²

Ibn Rushd also explains the discrepancy by trying to reconcile how jurists dealt with conflicting reports on what the Prophet did or said about the obligations to deceased children. He notes that one set of jurists holds that “[for] the child, do not pray over it...until it makes a sound” while another set says “as for the child, pray over it” [without any conditions].⁶³³ Regarding the first position, those jurists reason that a general (*‘āmm*) statement is being made that is then qualified with an explanation. The person performing the obligation must interpret the general statement in light of the explanation.⁶³⁴ As for the second position, it is a broader view premised on a jurist’s posture with regard to life. As Ibn Rushd notes, if the child moves then he is alive and subject to the same ruling as all Muslims: every living Muslim that dies is prayed over.⁶³⁵

Shāfi‘ī’s position finds support with jurists like Ghazālī, who state that if a fetus makes a sound after birth, and prior to dying, then it should be prayed over.⁶³⁶ He makes burial obligatory with even “one sound.”⁶³⁷ Kāsānī also revolves his position around

not that the Prophet necessarily performed them himself, thus dealing with two potentially conflicting ḥadīth. Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶³² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶³³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 241 (*emphasis added*).

⁶³⁴ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 241.

⁶³⁵ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 241.

⁶³⁶ Ghazālī, *al-Wasīṭ*, vol. 2, 375-376.

⁶³⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

sounds made after birth. He states that if a sound is made, then the child is to be named, washed and prayed over. However, if the child makes no sound then no ritual washing (and presumably no prayer) should be performed.⁶³⁸ This is a more extensive prohibition than Māwardī, who notes that even if no sound is made the child is entitled to be washed, shrouded and buried, despite the prohibition on performance of funeral prayer.⁶³⁹ Kāsānī continues his discussion of ritual washing for children by noting another distinction beyond the utterance of sounds. He notes that the ruling concerning ritual washing with regard to deceased pre-pubescent boys is by default the same as for adult men (*wa-l-ṣabī fī al-ghuṣl ka-l-bāligh*) for whom preconditions for washing the dead are similar to performance of prayer.⁶⁴⁰ However, it is different for a pre-pubescent boy who dies at an age when he is still unable to comprehend what he says during prayer. In this case, that boy has no obligation to pray while alive, let alone perform ablution as precondition for prayer.⁶⁴¹ As a result, Kāsānī argues that the ablution (*wuḍūʿ*) component of the ritual washing (*ghuṣl*) at death can also be dispensed with.⁶⁴² This is yet another example of the

⁶³⁸ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶³⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 30.

⁶⁴⁰ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶⁴¹ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶⁴² Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302. An interesting additional point that Kāsānī makes is that it does not matter if a child is a product of an illicit relationship between a Muslim mother and a non-Muslim father: funerary duties will still be conferred upon the child. This is because the child is not prevented from “righteousness” simply due to a disbelieving father. Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

symmetry jurists attempt to impose on life and death, a topic that will be discussed in greater detail at the end of this chapter.

As for the child that is stillborn, lacking any movement or making no sound subsequent to birth, the opinion regarding performance of funerary duties depends on when precisely the child died in the womb. On this basis, Māwardī reports two types of stillborn children. The first is a child that is miscarried within the initial four months. He suggests that every legal school prohibits the performance of both funeral prayer and ritual washing in this scenario.⁶⁴³ Instead, the child should be wrapped in a cloth (shrouded) and buried.⁶⁴⁴ The second type is a child who is miscarried *after* the four-month mark. In this case, the divine spirit (*rūḥ*) has been blown into the fetus. As a result, there are two different positions that jurists take. One position says that you should pray and wash it because the rules pertaining to living creatures apply to them as soon as the spirit has been blown in.⁶⁴⁵ The other position says that, despite the spirit being blown

⁶⁴³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31. Kāsānī reports that Shāfiʿī's opinion was that if the "fetus is aborted before four months then...you don't need to pray over it." Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶⁴⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31. This is based on Q 15/al-Ḥijr: 29 that suggests God only blows His "spirit" into human beings at the four month mark, indicating a new phase in the development cycle that many jurists came to associate with the actual beginning of life. Ibn Qudāma also mentions that it is sufficient to just shroud the "young child" in one small piece of cloth (*khirqā*) or up to three pieces, but he does not elaborate on what constitutes a small child. One might infer from his other discussions relating to funerary duties that his position may be close to that of Saʿīd b. Jubayr. Ibn Qudāma, *al-Mughnī*, vol. 3, 369.

⁶⁴⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32.

in, the rulings of life are not yet applicable so no prayer should be performed (though it is unclear whether it should be washed or not).⁶⁴⁶

Ghazālī speaks of the stillborn child as one for whom you do not see any “signs of life.”⁶⁴⁷ He also advocates neither washing nor prayer, but simply wrapping the child in a cloth and burying it because “his life never came to be” (*lam yataḥaqqaq ḥayātuhu*).⁶⁴⁸ That said, he does include a significant, and unusually subjective, exception, noting that if the fetus has an “outward appearance” of a “human being” (*ḡahara shakl al-ādami*) then this complicates the picture.⁶⁴⁹ Unlike other factors like making a sound or passing the first trimester, having the appearance of a human seems, on its face, open to significant levels of interpretation. It could be that Ghazālī was creating a broadly inclusive rule in order to promote the default performance of funeral rites for children except in very rare circumstances. By constructing such a subjective rule, Ghazālī is at once acknowledging that children should be treated differently for the reasons jurists note, while at the same time suggesting that the difference should not be too great. Hence, Ghazālī mentions three different opinions as to what should be done in circumstances

⁶⁴⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32.

⁶⁴⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 375-376.

⁶⁴⁸ Ghazālī, *al-Wasīṭ*, vol. 2, 375-376.

⁶⁴⁹ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

where the child has recognizable features. The first argues that all death rites should be conferred upon the child. In this case, the common definition of life as the presence of movement or sound is expanded to include a vaguer idea of appearance as a fully formed human being. The second opinion states that the fetus should not be washed or prayed over and the third opinion charts a compromised course that allows for it to be washed, but not prayed over.⁶⁵⁰ Among other things, these distinctions reinforce the hierarchy, mentioned earlier, that jurists create within funerary duties.

Kāsānī argues that numerous narratives confirm that one need not *pray* over a stillborn child, but a difference of opinion exists as to whether a stillborn infant needs to be washed or not.⁶⁵¹ He reports Shāfiʿī's opinion that if a fetus is aborted in the first four months of pregnancy then it does not need to be washed.⁶⁵² After four months, Kāsānī notes that there are two different views, returning again to the significance of the utterance of sounds. If the child makes a sound such that you are able to get an indication of life through its movement or crying, then the consensus (*ijmāʿ*) is to wash the child. These are all signs of life, meaning the child was alive, died and now must be washed.⁶⁵³

⁶⁵⁰ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

⁶⁵¹ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶⁵² Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

⁶⁵³ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

Unlike other jurists, Kāsānī also describes how this evidence for life would need to be proved, indicating that it only needs to be attested to by the mother or midwife to trigger the funerary duties. He reasons that this is sufficient by analogizing to singular reports (*khābar al-wāḥid*) which are acceptable in matters of religion as long as the source is trustworthy.⁶⁵⁴ This is indicative of the common disposition in Islamic law, and law in general, towards some symmetry in the law, if not always broader consistency.

Sinners: Hypocrites, Criminals, Suicides and Rebels

While the first two categories pertain to exceptional situations involving *non-adult* males and women, the remaining categories relate to adult males. In other words, these are adult males whose status departs from the default position mentioned earlier. In this regard, the third category discussed can be broadly construed as that of the sinner. This includes a variety of types including hypocrites, criminals, suicides and rebels, as well as general sinners. The larger question jurists seem to wrestle with is whether heterodox beliefs or illicit behavior, as opposed to the more extreme case of complete absence of belief, disqualifies a believer from being owed funerary duties. To some degree this question connects to larger theological discussions on the relationship

⁶⁵⁴ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

between faith and acts with regard to a believer's status. Apart from the issue of martyrdom, these exceptions implicate the issue of the community's boundaries. Who is a Muslim for ritual purposes? Who is a Muslim human being? What is the minimum criterion for inclusion in the category? It is not simply salvation that is at stake here, but the organization of communal life around religious identity over any tribal affiliation.⁶⁵⁵ Regulating death is not simply about the deceased, but about asserting *which* community he belonged to and binding the members of that community together through their particular method of paying final respects to one of their own.

This point is made by Ibn Rushd in his discussion of duties owed to sinners. He begins by stating that most scholars agree that as long as you have made the declaration of faith then you will receive the funeral rites owed to all Muslims. He bases his opinion on a Prophetic tradition that says "pray over whoever says there is no deity but God."⁶⁵⁶ This is regardless of whether one is guilty of committing major sins (*ahl al-kabā'ir*) or heresy (*ahl al-bida'*).⁶⁵⁷ One notable exception to this is Mālik, who did not endorse performance of this prayer in this context. As Ibn Rushd explains, the difference in

⁶⁵⁵ This is partly because the funeral becomes an occasion to regulate the community. It would bring together a "community of mourners...perhaps a hundred individuals" and this "fraction of a society could feel the power of orderly, communal action." Halevi, *Muhammad's Grave*, 235.

⁶⁵⁶ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

⁶⁵⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

opinion centers on the extent to which jurists consider sin to be grounds for excommunication from the faith. For him, this type of excommunication is not the “practice of the *ahl al-sunna*” and jurists are not obliged to conform to it, hence prayer (and in turn all other funerary duties) should be performed over such persons.⁶⁵⁸

On the other hand, while Māwardī does not necessarily stake a claim with regard to funerary duties for sinners, he does take issue with the justification for why funeral prayer should be said for “those guilty of moral offenses and sins” (*ahl al-dhunūb wa-l-khaṭāya*).⁶⁵⁹ The standard justification is that funeral prayers are performed for sinners as a way of interceding (*shafā‘ah*) on behalf of the deceased.⁶⁶⁰ Māwardī notes two examples that refute this suggestion. First, if this was the purpose of the funeral prayer then there would seemingly be no reason to pray over the insane (*majnūn*), dim-witted (*ablah*) or any mentally challenged person (*lā ‘aql lahu*) either, since it could be argued that these individuals lack culpability for their actions and so are technically sinless. Hence, a prayer for expiation would be pointless.⁶⁶¹ Second, prophets also do not need these prayers since they are sinless because God has forgiven them; technically prayer

⁶⁵⁸ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

⁶⁵⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶⁶⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶⁶¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

would not be necessary for them either then. However, he points out that we know that the Prophet is prayed for by multitudes (*afwājan*) of people since the request for prayer for him is part of every liturgy.⁶⁶²

With regard to hypocrites and heretics, Mālik's view was that not only was there no obligation to pray over them, but this prayer was actually forbidden. The reason was simple: denying them funeral prayers was a form of punishment for their behavior, presumably because it excludes them from the community.⁶⁶³ Explaining this further, Ibn Rushd argues there is actually consensus among jurists that funeral prayers should not be performed for the "heretic" whose heresy was "so severe" that it results in far-fetched interpretations (*al-tā'wīl al-ba'id*) that amount to disbelief (*kufr*).⁶⁶⁴ He also justifies dispensing with prayer for hypocrites based on Q 9/al-Tawba: 84, which states that "do not ever pray over any of them who die and do not go to their graves."⁶⁶⁵ Ghāzālī held the same position, stating that you can never pray over someone whose heterodoxy had risen to the point of *kufr*.⁶⁶⁶ However, Ibn Rushd notes that jurists place acts of hypocrisy along a spectrum. Some considered implausible interpretations (*al-ta'wīl al-ba'id*) to be

⁶⁶² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 31.

⁶⁶³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240.

⁶⁶⁴ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

⁶⁶⁵ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

⁶⁶⁶ Ghāzālī, *al-Wasīṭ*, vol. 2, 376.

enough to constitute *kufr* and remove the obligation to pray. Others did not consider implausible interpretations, as opposed to accusing the Prophet of falsehood (*takdhīb al-Rasūl*), enough to impute *kufr* to someone and permitted prayer over them.⁶⁶⁷

Whereas hypocrites or innovators were blameworthy for how their ideas created confusion in belief, other sinners were strictly assessed on the basis of their acts, regardless of their beliefs. For instance, what duties were owed to criminals created considerable debate among jurists. Ibn Rushd reports Mālik's position as prohibiting the performance of funeral prayers on people whose criminal acts rise to the level that they are eligible for *ḥadd* punishment.⁶⁶⁸ The reasoning was based on the Prophet's decision not to pray over Mā'iz, a famous historical case involving *ḥadd* punishment.⁶⁶⁹ Māwardī

⁶⁶⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

⁶⁶⁸ *Ḥadd* crimes are "offenses with fixed, mandatory punishments (*ʿuqūbāt muqaddara*) that are based on the Koran or the Sunna." In addition, it also includes "intentional homicide and wounding." The crimes in this category include theft (*sariqa*), banditry (*ḥirāba*), unlawful sexual intercourse (*zinā*), defamation regarding unlawful sexual intercourse (*qadhf*), drinking alcohol (*shrub khamr*), and apostasy (*ridda*). Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), 53. For some jurists, *ḥadd* punishment serves as expiation and they allow major sins to be atoned for through "earthly punishment." Christian Lange, "Sins, Expiation and Non-rationality in Ḥanafī and Shāfi'ī *fiqh*," in *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss*, eds. A. Kevin Reinhart and Robert Gleave (Leiden: Brill, 2014), 148. In fact, Shāfi'ī notes in *al-Umm* that the testimony of a slanderer cannot be accepted before they are punished with *ḥadd*; only after that are they fit to testify. Lange, "Sins," 151fn59. Interestingly enough, none of this seems to impact whether or not funeral prayers should be said over the deceased or not.

⁶⁶⁹ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240. The case of Mā'iz was of "central concern to Sunnī Muslim jurists" and crucial for the "development of Islamic criminal law." It involved a man named Mā'iz, a new convert who wished to confess to the crime of adultery. He approached the Prophet and begged him to

mentions that similar positions were held by both Ibn Shihāb al-Zuhrī (d. 124/742) and al-Ḥasan al-Baṣrī. Zuhri notes that funeral prayer should not be performed over anyone who receives capital punishment by stoning (*al-maqtūl ḥaddan bi-l-rajm*) or capital punishment in retaliation [for murder] (*maqtūl qawadan*).⁶⁷⁰ Al-Ḥasan al-Baṣrī makes the same point, but cites the example of a fornicating woman who dies while serving her punishment of confinement. He reportedly argued that neither she, nor any child in her womb, should be prayed over.⁶⁷¹ That said, Māwardī does report a significant caveat in Mālik's position. He confirms that while Mālik considered it impermissible for someone executed by *ḥadd* punishment to be prayed over, this was not an absolute prohibition. Instead, Māwardī contends that Mālik prohibited the state (specifically, the ruler or *imām*) from carrying out these prayers but did not extend this prohibition to relatives of the deceased criminal.⁶⁷² That said, Mālik's position regarding criminals seems to be in

punish him. The Prophet initially declined to hear the case, but Mā'iz returned a second and third time with the same request. Finally, at the fourth instance, the Prophet inquired into the case and tried to explain the acts as not having reached the level of adultery. However, this too was unsuccessful and eventually the Prophet found him guilty but did not institute a punishment. Instead, the townspeople seem to have carried out the punishment themselves: death by stoning. See, Intisar Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation and Islamic Criminal Law* (New York: Cambridge University Press, 2015), 26-27.

⁶⁷⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 51.

⁶⁷¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 51.

⁶⁷² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 51. Ibn Rushd notes that not only was Mālik opposed to the ruler praying over the deceased, but he was never himself seen to have prayed for someone who was killed by *ḥadd* punishment. Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239.

the minority. Māwardī himself supports the obligation to wash and pray over the criminal who is killed by *ḥadd* punishment.⁶⁷³

Suicide also presented a challenge for jurists since the act was considered sinful and prohibited, and for some jurists even criminal (a *taʿzīr* offense), but only harmed the perpetrator. More importantly while other criminal acts might easily be divorced from belief, suicide could be perceived both as indicating a lack of faith and as a sinful act. Hence, the question was how to categorize suicide? Should the act itself determine how it is treated or should one inquire into the faith or lack thereof of the person who kills him or herself? This challenge is reflected in the diversity of opinion among jurists regarding obligations owed to someone who commits suicide. Māwardī reports that Awzāʿī takes a position on suicide similar to Mālik’s with regard to criminals, arguing that you should *not* pray over anyone who commits suicide (*lā yuṣallī ‘alā man qatala nafsahu*).⁶⁷⁴ Māwardī’s own opinion regarding suicides is that they should be prayed over because of the general rule established by the Prophet saying it is “obligatory upon my

⁶⁷³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 51. The treatment of dead criminals also was discussed by other traditions. For instance, Plato recommended that, at least murderers, should have their corpses “cast out of the victim’s country unburied” after they are executed. Gurland, *Greek Way*, 95.

⁶⁷⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 51.

ummah to wash their dead and pray over them” (*furiḍa ‘alā ummatī ghusl mawtāhā wa-l-ṣalāh ‘alayhā*).⁶⁷⁵

Ibn Rushd says jurists are divided into two groups on the issue of suicide: one group believes no prayer should be performed while another permits prayer. Notably, Ibn Rushd indicates that the same group that does not permit prayer for suicide also does not permit it for major sinners, rebels (*baghy*) or innovators.⁶⁷⁶ Ibn Rushd attributes part of the difference here to the interpretation of a ḥadīth in which the Prophet reportedly rejected praying over a man who had killed himself.⁶⁷⁷ Those jurists who considered this to be an authentic account created a rule that you do not pray over a person who commits suicide. Others who did not consider it authentic still account for it by noting that even if someone might go to hell for committing suicide, the Prophet has said that a person with even a “seed of faith” will “eventually be expelled from hell.”⁶⁷⁸ In other words, they argue that funerary duties should still be performed because there can be

⁶⁷⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 51.

⁶⁷⁶ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 239. For a more comprehensive look at the subject of rebels see generally Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001).

⁶⁷⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240. Specifically, the ḥadīth reported by Jābir b. Samura. Ibid.

⁶⁷⁸ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240.

redemption after suicide and the person must still be considered a believer. In both cases though, “belief” is the focus for jurists more than the act.

The final group within the category of sinners is rebels. The primary doctrinal challenge raised by this group is the fact that neither their beliefs nor their acts are necessarily problematic. However, in particular contexts these same acts are transformed from licit to illicit. Hence, one question is the extent to which carrying out actions in a particular context can disqualify someone from receiving the funeral rites owed to them. The question might also be reframed as asking what are the political limits of the Muslim community for ritual purposes? As with other types of sinners, there is a fair amount of debate with regard to duties owed to rebels. However, jurists begin by making an important distinction, both explicitly and implicitly, based on whether a rebel is justified (*‘ādilan*) or unjustified (*bāghiyan*) in their rebellion (*bughā*).⁶⁷⁹ For “unjust” rebels, Abū Ḥanīfa does not allow the performance of funeral prayers and his two most prominent students, Abū Yūsuf and Shaybānī, agreed with this.⁶⁸⁰ The prohibition was apparently meant as a way to disassociate the unjust rebel from other Muslims, disparage

⁶⁷⁹ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 37.

⁶⁸⁰ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 303.

him for his actions and give him the legal status of an enemy combatant.⁶⁸¹ For rebels whose position is “just,” Abū Ḥanīfa takes a different position, requiring that they be washed and prayed over when they die, a position that Shāfi‘ī apparently shared.⁶⁸² Others, such as Abū al-Ḥasan al-Rustughfanī (d. 350/961), an adherent of Maturīdī theology, only obligated ritual washing to be given to rebels, but not funeral prayers.⁶⁸³ This was because they viewed washing as a right owed to the deceased, whereas the funeral prayer was God’s right (*bi-anna al-ghusl ḥaqquhu wa-l-ṣalāh haqq Allāh*).⁶⁸⁴

Māwardī offers a proof-text from the Prophetic tradition to support the obligation to wash and pray over rebels. The ḥadīth says that you should “pray over anyone who says ‘there is no deity but God’ and behind (i.e., be led in prayer by) anyone who says ‘there is no deity but God.’”⁶⁸⁵ In another tradition, the Prophet says “do not declare

⁶⁸¹ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 37. This status change is important because there are “binding regulations” that apply when Muslims were fighting Muslims, but do not apply when Muslims are fighting non-Muslims or apostates. For instance, when Muslims fight each other “the fugitive and wounded may not be dispatched,” Muslim prisoners cannot be “executed or enslaved,” women and children cannot be killed or imprisoned intentionally, Muslim property that is taken must be returned after the fighting is finished, etc. Khaled Abou El Fadl, “The Rules of Killing,” 144.

⁶⁸² Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 38. Kāsānī, *Badā‘i‘ al-ṣanā‘i‘*, vol. 1, 303.

⁶⁸³ Abū al-Ḥasan ‘Alī b. Sa‘īd al-Rustughfanī was from a village near Samarqand and renowned as both a jurist and theologian. He is considered to have played an “important role in the reception of al-Māturīdī’s teachings, as well as for the overall development of the Transoxanian Ḥanafite school of the fourth/tenth century. Ulrich Rudolph, *Al-Māturīdī and the Development of Sunnī Theology in Samarqand*, trans. Rodrigo Adem (Leiden: Brill, 2015), 140-144.

⁶⁸⁴ Kāsānī, *Badā‘i‘ al-ṣanā‘i‘*, vol. 1, 303.

⁶⁸⁵ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 37.

anyone a disbeliever from the people of your community, even if they commit a major sin...and pray over all your dead.”⁶⁸⁶ Hence, for Māwardī the fact that the deceased rebel, just or unjust, is a professed Muslim means they are owed duties of prayer and ritual washing, in the same way as fornicators or murderers. This is because the very act of prayer is a means of seeking “forgiveness and mercy for the unjust rebel.”⁶⁸⁷

Regarding the just rebel, Māwardī takes note of two positions. The first is that they should be prayed over and washed. The second is to not pray over them or wash them because of the historical precedent set by the case of ‘Ammār b. Yāsir, who was killed at Ṣiffīn and was neither washed nor prayed over.⁶⁸⁸ At first glance, this position seems counterintuitive: why confer funeral rites on an *unjust* rebel, but not a *just* one? However, a closer examination reveals that the just rebel is in a favored position based on the analogous situation jurists are using to develop the duties owed to different types of rebels. Hence, the unjust rebel is likened to the sinner; as long as he professes to be Muslim then his actions will not disqualify him from receiving funeral rites. However, the just rebel is compared to the martyr, a position of much greater esteem. As will be

⁶⁸⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 37.

⁶⁸⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 37.

⁶⁸⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 38.

discussed later, no funeral rites are performed for martyrs, seemingly in recognition of the sacred status they have secured because of the manner of their death.⁶⁸⁹

Nonbelievers

The fourth category impacting the performance of funerary duties is that of nonbelievers. In general, funeral rites for nonbelievers are not a primary concern for jurists since Islamic ritual law does not apply to non-Muslims. As Ghazālī states, “you can never pray over a non-Muslim.”⁶⁹⁰ Ibn al-ʿArabī cites the proof-text from Q 9/al-Tawba: 84, which prohibits praying for or standing at the grave of anyone that “rejected God and His Messenger.”⁶⁹¹ However, it is not simply a neutral non-application that jurists are discussing here; they also believe that non-Muslims are not entitled to receive the benefits associated with performance of these funerary duties. As Kāsānī explains, it is “not necessary to wash the disbeliever (*kāfir*) because washing should only be done out of dignity and respect for the deceased, but the disbeliever is not someone deserving of dignity and respect.”⁶⁹² However, this is the easy case and despite the sweeping

⁶⁸⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 38.

⁶⁹⁰ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

⁶⁹¹ Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, vol. 2, 559.

⁶⁹² Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 302.

statement, there are circumstances in which the duty to perform some or all of the funeral rites for non-Muslims might be triggered, or where non-Muslims may be permitted to perform the rites. Specifically, there are two primary contexts discussed: nonbelievers with kinship ties to Muslims and the nonbelievers killed during warfare that also involved Muslims. Jurists seek to answer the question whether non-Muslim family members can perform funeral rites for their relatives and what should be done when Muslim and non-Muslim dead are mixed together after a battle? The answers reveal how jurists navigate between profane pragmatism and preserving the sacrality of these rites, as well as the limits of kinship before moral community in the context of religious obligation. As Ibn Rushd notes, juristic differences here revolve around perception of the rites being carried out: is ritual washing a sacred ritual or simply for cleanliness? Those who permit the washing of a nonbeliever will say it is for cleanliness, while those who argue against it will say it is a sacred ritual.⁶⁹³

To begin, jurists explore several different scenarios involving non-Muslim kin to try to develop the parameters for their participation in the performance of funerary duties. The most relevant cases arise out of interfaith marriages between Muslim men and non-Muslim women. Jurists address the issue by re-categorizing certain acts as

⁶⁹³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

permissible, as opposed to obligatory, with regard to non-Muslim spouses. Hence, Māwardī discusses the case of a non-Muslim wife passing away; he permits her Muslim husband to wash her body according to Islamic custom as long as this is amenable to the patrons of her own religious community (*awliyā'uhā min ahl millatihā*).⁶⁹⁴ The same also holds true for the opposite scenario: if a Muslim man dies his *dhimmī* wife is permitted to wash him.⁶⁹⁵

From Shāfi'ī's perspective, this is permissible but strongly disliked because funerary duties are obligations for members of the Muslim man's religious community; there is no such obligation for the non-Muslim wife.⁶⁹⁶ However, he permits the wife's performance because even though the duty is an obligation for the Muslim community to fulfill, it is also a right that the living owe the dead.⁶⁹⁷ The latter is arguably more important and its fulfillment is enough to overcome the shortcoming of depriving the Muslim community the opportunity to complete their obligation. It is also sufficient to overcome another central challenge for the performance of funerary duties: the presence of the proper intention. However, Māwardī states that "intention" cannot be a

⁶⁹⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 17.

⁶⁹⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 17.

⁶⁹⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 17.

⁶⁹⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 1, 91.

condition for the washing because a *dhimmī* could not then be permitted to perform the duty since a *dhimmī* cannot make the appropriate intention.⁶⁹⁸ Instead he reasons that because the act of purification is a duty owed to someone else, the person whose act will achieve the purification (i.e. the washer) does not require the intention. Māwardī analogizes this situation to the case of a mentally challenged wife. He notes that her husband is permitted to wash her after her menstrual cycle in order to have sexual relations with her even though she is not capable of forming the requisite intention needed for washing after the menses.⁶⁹⁹ Similarly, it does not matter whether the *dhimmī* can form the requisite intention or not because, like the husband, he is carrying out the washing as a proxy for the deceased.

Aside from the spouse, there is also a question as to restrictions on other non-Muslim family members performing the funerary duties. Ibn Rushd raises the issue of whether it is possible for the non-Muslim father to wash and prepare his Muslim child's body for burial. He reports that Mālik considered this unacceptable and did not even allow the non-Muslim father to bury the child except for some limited exceptions.⁷⁰⁰ Shāfi'ī considers it acceptable for a Muslim to be washed and buried by close family

⁶⁹⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 1, 91.

⁶⁹⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 1, 91.

⁷⁰⁰ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

members, even those who are pagan. This opinion is supported by Abū Thawr, Abū Ḥanīfa and his students.⁷⁰¹ Ibn al-Mundhir reportedly recognized that there was precedent for a pagan washing a Muslim but said that it was not a *sunna* that required following.⁷⁰²

Kāsānī supports this view; even though there is nothing in the Qurʾān that provides guidance on this, he says it simply cannot be possible because ritual washing must be done by Muslims. As evidence, he cites the case of a Jewish boy who passed away while employed by the Prophet. The Prophet apparently encouraged the boy to convert to Islam before dying and the boy became a Muslim. After his death, the Prophet told his Companions, “come and take your brother,” in other words, perform the funerary duties you owe him. Kāsānī uses this story to illustrate a rule created by the negative implication of the Prophet never asking the boy’s Jewish father, who was present, to participate in the funeral rites.⁷⁰³ For Kāsānī, this means that despite the father/son

⁷⁰¹ Ibn Rushd, vol. 1, 227. This opinion of Shāfiʿī’s is also reported by Māwardī. See, Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 19.

⁷⁰² Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

⁷⁰³ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303. Aspects of this story remain confusing. First, we do not actually know what transpired with the performance of the funeral rites; all we have is the command that these rites should be performed. Maybe the instruction was simply to prepare the boy for the performance of funeral rites and the father would be the one performing them. Or maybe the command was also meant to include the father in the first place. Second, Kāsānī makes an additional omission: the boy converts to Islam on the encouragement of his Jewish father. See, *Ṣaḥīḥ al-Bukhārī* 1356 (Book 23, Ḥadīth 110). This seems a bit odd: why would a Jewish father jeopardize his son’s afterlife on the son’s deathbed by

relationship, the link to a particular religious community was more determinative of who performed funeral rites.

On the other hand, Māwardī reports that Shāfi‘ī permitted the closest relatives of a Muslim to wash him and join his funeral procession, even if they were polytheists (*mushrikīn*).⁷⁰⁴ Likewise, Māwardī notes that if a pagan dies, and his closest relatives are Muslim, then they are required to wash him, shroud him and lead the funeral procession. He notes that the Prophet told ‘Alī to wash, shroud and bury his nonbelieving father, but not to perform the funeral prayer.⁷⁰⁵ However, if the disbeliever has both pagan and Muslim relatives, then the nonbelieving relatives are prioritized for performance over the Muslim relatives.⁷⁰⁶ This is because although the Muslims and nonbelievers are both relatives, a shared faith, even if an idolatrous one, gives those relatives increased rights with regard to the deceased.⁷⁰⁷ This is an even stronger indication of the priority jurists

approving and encouraging his conversion to another faith? With regard to “negative implication,” it commonly appears in works of legal theory though not necessarily as a technical term. For instance, Shāfi‘ī uses it to argue that the Qur’ān speaks of “rules for compensation in cases of wrongful death” involving only Muslims and, thus, indicates “by negative implication” that killing non-Muslim enemy combatants’ women and children will lead to “no adverse legal consequences.” Joseph E. Lowry, “The Legal Hermeneutics of al-Shāfi‘ī and Ibn Qutayba: A Reconsideration,” *Islamic Law and Society*, vol. 11, no. 1 (2004), 27fn55.

⁷⁰⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 19.

⁷⁰⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 19.

⁷⁰⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 19.

⁷⁰⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 19.

placed on religious identity versus kinship ties. Not only do they promote this in the context of performing Muslim funerary duties, but also non-Muslim funeral rites. The deceased's religion, even if it is not Islam, will be the first point of reference over what duties are performed and who performs them. Jurists further affirm the boundaries of the moral community for Muslims by prioritizing the same premise of that community, religious affiliation, in defining other communities.

Another outgrowth of the interfaith marital context is the scenario where a non-Muslim spouse and her unborn Muslim child are both killed. Here again, the issue of the boundaries of the community arises, and the tension between religious and familial affiliation. Jurists ask what happens if there are duties owed to the child, but performing them would mean bestowing those same rites upon the nonbelieving mother? The issue for jurists is not necessarily one of disparate treatment for these women, but recognizing their particular faith identity and not simply imposing a Muslim one on them because of the child. They seem to agree that funeral prayer should not be performed and are generally indifferent about washing and shrouding in this context. However, burial is of special concern.

For instance, Ibn Ḥazm asks where the non-Muslim wife will be buried if she dies with a Muslim child in her belly? His answer suggests determining the location of the

non-Muslim mother's grave based on where the unborn child is in the lifecycle. If the woman dies less than four months into her pregnancy then her unborn child has not yet received the divine spirit (*rūḥ*); as a result, the non-Muslim mother should be "buried with the people of her religion," not among Muslims.⁷⁰⁸ In some respects it is as though the unborn child's religion is not yet operative and so has no impact. However, if the pregnancy is past four months, then the spirit has been breathed into the child and the mother should be buried with Muslims. This is because her child is now entitled to all the privileges owed to a Muslim and one of them is to be buried among Muslims.⁷⁰⁹ This is a stark example of how communal boundaries are set based on religious as opposed to familial affiliation. Membership in the Muslim community occurs even prior to the child leaving the mother's womb and is consequential enough to overcome even the mother's own affiliations.

As Kāsānī asks in relation to this scenario: "what is her [the mother's] status since she has a Muslim inside her?" He notes that there is "consensus" that funeral prayers should not be performed for her, but she should be washed and shrouded. This is because neither the woman nor what is inside of her are entitled to funeral prayers.⁷¹⁰ Unlike Ibn

⁷⁰⁸ Ibn Ḥazm, *Muḥallā*, vol. 5, 143.

⁷⁰⁹ Ibn Ḥazm, *Muḥallā*, vol. 5, 143.

⁷¹⁰ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

Ḥazm, Kāsānī does not mention the divine spirit being breathed into the child. This is not entirely surprising since he does not raise the idea of the divine spirit in any meaningful way during his discussion on deceased children and the duties owed to them. Instead, Kāsānī notes that juristic differences on this topic are connected to whether the child's status as a Muslim alters the mother's status. Some jurists argue that the mother should be buried in a Muslim cemetery because her child is Muslim. Others say that even though the child is Muslim, it is still a part of her and not a separate entity, thus she should be buried in a non-Muslim cemetery.⁷¹¹ This seems to be Kāsānī's position as well, arguing that "what is in her womb is not deserving of prayer either, but she should be washed and shrouded (*wa-mā fī baṭṭniḥā la yastaḥiqq al-ṣalāh ʿalayhi, wa-lākinnaḥa tuḡhasal wa-tukaffan*).⁷¹²

As mentioned earlier, the other area where nonbelievers are discussed is in the context of war. Several questions are raised about funerary duties owed to non-Muslim fighters and civilians in warfare. Jurists also address more complicated situations such as duties owed when Muslim and non-Muslim dead cannot be distinguished from each other at the end of battle. Ghāzalī mentions two types of non-Muslim fighters involved

⁷¹¹ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

⁷¹² Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

in warfare: those that oppose Muslims and those who side with them. The default, easy case is that no burial duty is owed to the non-Muslim who fights against Muslims.⁷¹³ However, not all non-Muslims fight *against* Muslims. Hence, the *dhimmī* who dies in warfare should be buried and shrouded as a *kifāya*-duty, but cannot be prayed over. Ghāzalī relays the opinion of Abū al-Ḥasan al-Ṣaydalānī who said that the *dhimmī* who fights with the Muslims is like a battlefield warrior and will not have the status of *dhimmī* after death.⁷¹⁴

Ibn Ḥazm notes that there are conflicting reports on how non-Muslims should be treated when it comes to their death. In one instance, there are various ḥadīth suggesting that no funeral rites should be conferred upon them. For instance, he mentions the Battle of Badr where the Prophet apparently “ordered twenty-four men from the Qurayshi force to be cast into one of the wells of Badr” as opposed to being buried.⁷¹⁵ Likewise, in another narration the Prophet instructed people that if they killed someone from the Banū Qurayẓa they should dig a trench and throw them in it.⁷¹⁶ On the other hand, Ibn Ḥazm also reports that when the Prophet’s nonbelieving uncle Abū Ṭalib passed away,

⁷¹³ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

⁷¹⁴ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

⁷¹⁵ Ibn Ḥazm, *Muḥallā*, vol. 5, 117.

⁷¹⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 117.

‘Alī, his son, asked “who will bury him?” The Prophet instructed him: “bury your father.”⁷¹⁷ Likewise, Ibn Ḥazm mentions an incident where someone asked Ibn ‘Abbās, what should be done about a Christian man who passed away leaving only a son; Ibn ‘Abbās told him, “it is necessary for you to walk with [the son] and bury [the father].”⁷¹⁸ Another tradition recalls that the mother of al-Ḥārith b. Abī Rabī‘a died and she was a Christian, but her final rites were performed by the Prophet’s Companions.⁷¹⁹

A closer look at these apparently contradictory reports suggests the difference is due to the two contexts we began with: family and war. In the context of war, funeral rites are not conferred on non-Muslims, but this is consistent with how Muslim martyrs are treated as well: warfare suspends some funerary duties. Of course, for Muslim martyrs this suspension also contains an elevated status: their death is so pure of purpose it does not require cleansing. In the context of familial relationships, certain requirements persist even if a family is of mixed faith.

The primary situation jurists are preoccupied with in the context of non-Muslims and warfare is when, after a battle, Muslim and non-Muslim dead are mixed together, such that they either cannot be distinguished from each other or it is not practically

⁷¹⁷ Ibn Ḥazm, *Muḥallā*, vol. 5, 117.

⁷¹⁸ Ibn Ḥazm, *Muḥallā*, vol. 5, 117.

⁷¹⁹ Ibn Ḥazm, *Muḥallā*, vol. 5, 117.

possible for them to be separated. In these situations, the question arises as to what type of duties are owed to the dead and how to reconcile this with the general prohibition not to perform funeral rites on non-Muslims opposing you in battle. Ghazālī obligates washing and shrouding the mixed dead, but when it comes to prayer, it must be performed with an intention (*niyyah*) that distinguishes between Muslim and non-Muslim.⁷²⁰ Māwardī suggests that when the dead are mixed in this way, the obligation is to pray over groups of them at a time and make intention specifically with regard to the Muslims in each group.⁷²¹ The relative ratio of Muslims to non-Muslims in each group does not matter to him; the same instruction applies to one Muslim with a hundred disbelievers or one disbeliever among a hundred Muslims.⁷²² This is as opposed to Abū Ḥanīfa who reportedly held the opinion that you can only pray over the group if the Muslims are in the majority, but not if they are equal or in the minority.⁷²³ Māwardī disagrees with this position, arguing that if you pray over a group where Muslims are the majority the intention is for your prayer to be on every Muslim present and not on the non-Muslims. The same would be true if Muslims were the minority in the group. In the

⁷²⁰ Ghazālī, *al-Wasīṭ*, vol. 2, 376.

⁷²¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 38.

⁷²² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 38.

⁷²³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 38.

same vein, if the fear is that you might mistakenly pray over a nonbeliever, this will remain the case whether Muslims are in the minority or majority in the group.⁷²⁴

Kāsānī addresses the situation by proposing some precursors to fulfilling the funerary duties. To begin with, he suggests attempting to separate Muslims from non-Muslims, since this is a preferred option. To this end, he recommends investigating four common external signs of a Muslim: circumcision (*khitān*), henna dyed hair of the beard or head (*khiḍāb*), black clothing (*labs al-sawād*) and shaved pubic hairs (*ḥalq al-ʿāna*). If the first step is unsuccessful, then Kāsānī suggests, similar to Abū Ḥanīfa, determining whether most of the dead are Muslim or not. If they are, then he obligates the performance of all four funeral rites: prayer, washing, shrouding and burial. On the other hand, if most of the people are non-Muslim and you suspect someone to be Muslim from among them, but there are no clear signs, they should be washed but not prayed over.⁷²⁵

Kāsānī reports an even more pragmatic approach from Abū Jaʿfar al-Ṭaḥāwī (d. 321/933) for situations where the religion of an individual is unclear. Ṭaḥāwī begins by discussing those funerary duties that are obligatory and those that are permitted. For prayer, he notes that it is never permissible to pray over a non-Muslim, suggesting that

⁷²⁴ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 38.

⁷²⁵ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

it is better to forgo the obligation to pray over a Muslim than to pray over a nonbeliever (*tark al-ṣalāh ‘alā al-Muslim awlā min al-ṣalāh ‘alā al-kāfir*).⁷²⁶ As a result, the only duties that one may consider performing for a nonbeliever are washing, shrouding and burial. Ṭaḥāwī also discusses the permissible and obligatory in the context of ritual baths, noting that it is obligatory to wash a Muslim and generally permissible (*jā’iz fī al-jumla*) to wash a non-Muslim. As a result, he advocates being guided by the following legal maxim: “perform that which is permissible, in a general way, in order to satisfy the obligation [in all its parts]” (*fa-yu’tā bi-l-jā’iz fī al-jumla li-taḥṣīl al-wājib*).⁷²⁷

Strangers

Thus far, the exceptions to the funerary duties pertain to individuals whose bodies are whole and whose identities are known, which includes females, children, sinners, Muslims and non-Muslims. However, another category of exceptions involves individuals who may be “incomplete” in either body or person, where their identities may not be fully known or only physical fragments of their bodies exist, which makes them in some sense strangers. These two situations are grouped together because they

⁷²⁶ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 303.

⁷²⁷ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 303.

raise similar issues for jurists: what types of duties are owed to people who are not “whole?” Jurists discuss two different situations in which knowledge of the identity of the deceased is incomplete. First, the main discussion centers on duties owed to the person to whom the human limbs once belonged before they were separated from his body. Second, “john doe” or deceased individuals who have not been identified are discussed. Aside from specific questions as to whether funeral rites are required for fragments of the body, there is a broader question on what funerary duties are owed to people whose identity you cannot determine. What is the default set of rites to be performed for them? Is it worse to perform impermissible acts on someone or omit the performance of required duties they are owed?

Jurists devote most of their discussions to limbs that are separated from the body. In general, but not always, this occurs as a byproduct of warfare, when a weapon has severed parts of the body. The main question is whether funeral rites need to be performed on a partial body. Other questions include whether it is necessary to determine if the person who lost the limb is still alive, whether they are Muslim, what their gender is, etc. In this regard, it is prudent to begin with Abū Ḥanīfa’s widely reported opinion on this matter. He argues that only if most of the person is still intact

should they be prayed over (*yuṣallā ‘alā aktharihi wa-lā yuṣallā ‘alā aqallihī*).⁷²⁸ Hence, only if at least half a person is found, with a head or more than half the body with no head, then can they be washed, shrouded and prayed over.⁷²⁹ With regard to limbs, Shāfi‘ī focuses attention on what to do with the limbs if the person who lost them is still alive. He notes that jurists have held two opinions: to either wash and pray over the limbs as though they belonged to a dead person or not to perform any funeral rites over them.⁷³⁰

Māwardī supports this latter position. He considers it problematic to pray over severed limbs of someone who is alive since you will not be praying over the rest of the body.⁷³¹ If the person is deceased and their severed limbs are found, Māwardī says you should wash and pray over them.⁷³² However, he allows limbs *not* to be buried if they have been separated from the body, except for private parts: those must be shrouded and buried after praying over them.⁷³³ This is a rare occasion where the hierarchy of performing funeral rites is disrupted. Ordinarily if a prayer or washing had been performed for a deceased person then shrouding and burial would automatically occur

⁷²⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32; Ghazālī, *al-Wasīṭ*, vol. 2, 375; Ibn Ḥazm, *Muḥallā*, vol. 5, 138.

⁷²⁹ Ibn Ḥazm, *Muḥallā*, vol. 5, 138.

⁷³⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32.

⁷³¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32.

⁷³² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32.

⁷³³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 32.

as well. However, here, despite washing and praying over them, burial is not required. The performance of prayer was justified by some jurists as the recognition that the sanctity of the limbs was by necessity connected to the sanctity of the whole body.⁷³⁴

This is also Ibn Ḥazm's position regarding limbs of the deceased: nothing of the body is prohibited from being washed or shrouded for burial simply because the deceased is dismembered by injury or wound.⁷³⁵ In fact, he goes so far as to say that you should pray over any part of the dead Muslim you find: even a fingernail or hair.⁷³⁶ This is a prime example of Ibn Ḥazm's commitment to the consistent application of his strict constructionist approach to texts: practical considerations should not disrupt adherence to the text regardless of where it leads. Part of his argument is that in theory you can pray over a dead Muslim even when there is *nothing* present, prayer in absentia (*ṣalāt al-ghā'ib*), thus performing the remaining rites when only some parts of the body are present is not problematic. In fact, he argues that it is impermissible to forgo these funerary duties upon separated limbs.⁷³⁷ Ibn Ḥazm also critiques Abū Ḥanīfa's position

⁷³⁴ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 32. He cites some historical precedent for this, mentioning the fact that 'Umar apparently prayed over bones in Syria and that the finger of 'Abd al-Raḥmān b. 'Attāb b. Asīd was prayed over when a bird carried it to Mecca from the Battle of the Camel. Apparently, the ring on the finger allowed people to identify it as belonging to 'Abd al-Raḥmān. Ibid.

⁷³⁵ Ibn Ḥazm, *Muḥallā*, vol. 5, 114.

⁷³⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 138.

⁷³⁷ Ibn Ḥazm, *Muḥallā*, vol. 5, 138.

that conditions performance of funerary duties on how much of the body is found. He finds this distinction to be baseless, arguing that not only does it lack any textual support but it creates confusion by requiring people to determine the percentage of the body taken up by a particular limb, but not providing any guidance on how precisely to do this.⁷³⁸ Ghazālī also connects funeral prayer over limbs to “prayer for the dead who are absent” (*ṣalāh ‘alā al-mayyit al-ghā’ib*). If the owner of the limb is alive then it should not be prayed over, but if they are dead then it should be prayed over, washed, wrapped and buried.⁷³⁹

While limbs are the primary issue discussed in this category, there are also situations where there is incomplete information about deceased individuals whose bodies are still intact. In other words, they are whole physically but their identity is not fully known. For instance, Shāfi‘ī reportedly discussed the situation of someone who dies while traveling. The question arises as to what duties are owed to this person if their identity is unknown. He notes that individuals travelling with the deceased have to be mindful not to neglect “the rights of their brother” relating to death. Māwardī reports Shāfi‘ī as saying that “the best course is for a Muslim [traveler] to bury him [i.e., the

⁷³⁸ Ibn Ḥazm, *Muḥallā*, vol. 5, 138.

⁷³⁹ Ghazālī, *al-Wasīṭ*, vol. 2, 375.

stranger]” because if the deceased is left in the desert and no one passes (thus, no rites are performed) then this will be considered “sinful and disobedient to God’s command.”⁷⁴⁰ More importantly, he stresses the importance of fulfilling this duty by making a rare comment about worldly punishment for failure to perform. Specifically, Shāfi‘ī says that the Sulṭān is charged with punishing anyone who omits the performance of these acts (*wa-‘alā al-sulṭān an yu‘āqibahum ‘alā dhālik*). Their crime is “negligence towards the right of God” and “belittlement of what is obligatory upon” their Muslim brother.⁷⁴¹ Of course, he makes an exception for situations of necessity, namely where they are fearful of hostile territory or becoming vulnerable to attack while they perform rites owed to the deceased.⁷⁴² Regardless, this is a rare instance where failure to perform a duty, collectively owed by Muslims, is assigned some measure of earthly accountability.

Māwardī also discusses cases of unidentified individuals who are entirely unknown. The scenario that he, and other jurists, often note is the passerby who comes across a dead person in the desert: what obligation is he owed? Māwardī says that the passerby is required to perform funeral rites upon the deceased (*lazimahum al-qiyām bihi*) regardless of whether it is a man or a woman. Furthermore, if the duty is disregarded

⁷⁴⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

⁷⁴¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

⁷⁴² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

then he explicitly states that they are in error and sinful.⁷⁴³ Māwardī also considers the possibility that the body has already had funeral rites performed for it, but either was never buried or has somehow been removed from the grave. The passerby is instructed to examine the body for any signs of washing or shrouding, and if none are present then these rites, along with the other ones, should be performed.⁷⁴⁴ Alternatively, Māwardī says if there are indicators that funeral rites have been performed then the body should simply be buried. If anyone wishes to pray over him they may do so only after burial since there is a strong likelihood that funeral prayers have already been performed even though there are no indications of this on the body. If there are signs of washing, shrouding or embalming on the body then they must simply be buried. If they decide to pray upon him then they should pray upon his grave after he has been buried because he has already been prayed over.⁷⁴⁵

Kāsānī also discusses situations in which one comes across a dead body. However, he does not base his analysis on indications that funeral rites had previously been performed; instead he focuses on other markers of identity and location. He begins by requiring an examination of the body to see if there are attributes suggesting that it

⁷⁴³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

⁷⁴⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 6.

⁷⁴⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 7.

belongs to a Muslim. If there are, then he obligates performance of funeral rites on the deceased including burial in a Muslim cemetery.⁷⁴⁶ However, he notes that jurists are divided as to whether these rites should still be conferred upon the deceased if no attributes linking them to Islam are found.⁷⁴⁷ For Kāsānī, the same obligations may exist even when there are no attributes to identify the person as Muslim, as long as the body is discovered in Muslim territory (*dār al-Islām*). That fact alone creates a high enough probability that the person was Muslim to allow the confidence of funerary duties.⁷⁴⁸ In essence, location functions as the identity marker. On the other hand, if the body is found in enemy territory (*dār al-ḥarb*) then the attributes on the person indicating they are Muslim carry more weight than the location.⁷⁴⁹ If those attributes are found, then the consensus is that all funeral rites should be conferred. However, if they are not found then nothing should be done.⁷⁵⁰

Martyrs

⁷⁴⁶ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

⁷⁴⁷ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

⁷⁴⁸ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 303.

⁷⁴⁹ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 304.

⁷⁵⁰ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 304.

The final exception to funerary duties is an individual whose death is considered martyrdom. In general, martyr status is acquired in the context of war and jurists primarily concern themselves with whether or not this context should alter duties owed to the dead. Specifically, when a person becomes a martyr does this excuse the community's performance of funerary duties for him? For the most part, jurists respond in the affirmative: funeral rites should not be conferred. They mainly base their opinion on a few reports from the Prophetic tradition. Jurists develop their framework for funerary duties on the basis of these ḥadīth prooftexts. In doing so, they seem to keep two connected, but often conflicting objectives in mind: practical necessity and purity. Regarding practical necessity, the rules reflect the jurists' understanding that conferring funeral rites on fallen fighters is not always possible given the circumstances of war. During battle, the risks are too significant for someone to both fight the enemy and perform funeral prayer, ritual washing, shrouding or burials. Even when the conflict is over, the impracticality of performance often persists, especially if the number of dead are so significant that performance of rites for each person individually becomes untenable.⁷⁵¹

⁷⁵¹ Some scholars have also advanced the idea of practical necessity behind the law for martyrs because the "Islamic funerary law was designed for an urban environment." See also, Halevi, *Muhammad's Grave*, 160.

Regarding purity, jurists are keen on preserving the elevated status of martyrs in comparison to those who die outside the context of war. An exclusively practical calculus for their funerary duties diminishes the elevated status of martyrs; jurists are not comfortable with this. How can it be possible for those who make the ultimate sacrifice for their religion to have rites around their death determined by practical considerations alone? Arguably, in their search for more profound reasons to forgo funerary duties, they offer ideas that further a sacred conception of martyrdom. The *nonperformance* of funeral rites then becomes indicative of greater worth; the martyr's blood accomplishes the same purpose as water and purifies the body after death. In many respects, they are outlining the boundaries of who the community should consider a "hero" and who is not worthy of that label. This is an extension of their attempt at other places to establish the boundaries of the Muslim community itself.

However, these two objectives present challenges for the jurists, especially when we try to reconcile how they work in conjunction with one another. If we accept that funerary duties should be suspended for practical reasons then is it possible to also argue that martyrs have an elevated status? Similarly, if we argue that martyrs have an elevated status, it seems counterintuitive since they receive the same treatment as nonbelievers when it comes to funeral rites. How is it possible for the most elevated

status and, arguably, the least elevated status to receive the same treatment? Practical necessity alone does not allow martyrs to claim an elevated status, so some sacrality must be inserted into the martyr's death. However, this does not address the equivalency in performance accorded nonbelievers and martyrs: neither receive funeral rites. One might explain this apparent equivalency by distinguishing between nonbelievers not receiving *Islamic* funeral rites, but being eligible for funeral rites from their own communities. Hence, nonperformance of funeral rites for nonbelievers is because they are not entitled to them, whereas nonperformance for martyrs is because they do not require them even though they are entitled. Or put another way, nonbelievers do not receive Islamic funeral rites because they are not part of the moral community; martyrs do not receive these funeral rites because they have given their lives to preserve the moral community, demonstrating the ultimate indication of membership. They require no additional affirmation through the conferring of funeral duties upon them.

This section proceeds by first examining how the general rules for funeral rites are altered by the specific context of martyrdom. This includes each of the four rites discussed: prayer, ritual washing, shrouding and burial. In the process, the martyrdom context will also acquire its own set of "general rules" and so the examination will turn to the variations in these rules that developed for the special case of martyrdom.

Following that, atypical situations of martyrdom will be explored along with any accompanying rule changes. Finally, the question of purpose will be examined, namely what objectives are the rules seeking to accomplish? Here the debate is whether funeral rites, particularly ritual washing, seeks to cleanse the martyred corpse as a means of achieving physical purity or ritual purity.

With regard to the duties framework for martyrs, there is a fair amount of consensus with regard to nonperformance of most funerary duties for those martyrs who die while fighting nonbelievers on the battlefield. Where differences emerge, it is due primarily to a change in the location of the death (removed from the battlefield) or a change in how the fighter was killed (not by a nonbeliever). Among the early jurists, Mālik and Shāfi‘ī reportedly said prayer should not be performed for a martyr who dies in battle, whereas Abū Hanīfa required it.⁷⁵² Ibn Rushd attributes the difference of opinion to the primacy that these jurists respectively give to two main ḥadīth narrations. In one of them, Abū Dawūd recounts that the Prophet ordered martyrs to be buried in their clothes with no ritual washing or prayer. In another, Ibn ‘Abbās narrates that the Prophet performed funeral prayers for people who had been killed, including his uncle

⁷⁵² Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240; see also, Ibn Ḥazm, *Muḥallā*, vol. 5, 116; Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 33-35.

Ḥamza, but did not wash them.⁷⁵³ Later jurists seem to follow the respective positions of their school's eponym, for instance, Māwardī notes that his fellow Shāfi'īs agree that a martyr should not be prayed over.⁷⁵⁴ For Māwardī, the martyr's situation can best be understood by analogizing it to the stillborn child: "everything not required to be performed for the stillborn is not required to be performed for the martyr" (*kull mā lā yalzam fi'luhu fī al-siqṭ la yalzam fi'luhu fī al-shahīd*).⁷⁵⁵ Elaborating on the position of nonperformance of funeral prayers for martyrs, Ghazālī goes beyond making it non-obligatory and holds performance to be forbidden (*ḥarām*).⁷⁵⁶

The ritual washing of martyrs is governed by principles similar to those pertaining to prayers for martyrs killed by nonbelievers on the battlefield. Mālik, Abū Ḥanifa and Shāfi'ī agreed that the martyr who dies in battle should not be washed.⁷⁵⁷ Ibn Rushd says that this is the majority position and is based on a Prophetic ḥadīth that commanded neither prayer nor washing for the people who were killed at Uḥud; instead, they should be buried in their clothes.⁷⁵⁸ Shāfi'ī reportedly held that martyrs should not

⁷⁵³ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240.

⁷⁵⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 37.

⁷⁵⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 34.

⁷⁵⁶ Ghazālī, *al-Wasīṭ*, vol. 2, 379. He acknowledges that some of his fellow Shāfi'īs permit prayer over martyrs, but adds that they do not make it obligatory. Ibid.

⁷⁵⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 240.

⁷⁵⁸ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227. Māwardī mentions the same tradition by Jābir b. 'Abd Allah and Anas b. Mālik. Māwardī, *See*, Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 34.

be washed or prayed over, but instead buried in the clothes that they died in. He bases this view on the fact the Prophet apparently never prayed over martyrs or washed them.⁷⁵⁹ Māwardī reports that Mālik, and others from the “people of Mecca and Medina,” as well as Abū Ḥanīfa held the same opinion that those killed in battle with disbelievers should not be washed. The opposite opinion was apparently held by Ibn ‘Umar, Sa‘īd b. al-Musayyab and al-Ḥasan al-Baṣrī.⁷⁶⁰ Māwardī himself says that if it is established that a person was killed in battle, then they should not be washed or prayed over and that the manner in which they were killed makes no difference (*sawā’un qutila...‘alā ayyi ḥālīn kāna*).⁷⁶¹ Ghazālī also states explicitly that the martyr should not be washed.⁷⁶² Ibn Muflīḥ goes so far as to say that if a person is killed while fighting, but lacks legal capacity (*ghayr mukallaḥ*), they should still not receive a ritual washing. Strictly speaking, because they lack legal capacity they are not eligible, according to many jurists, for martyrdom status. Hence, their ineligibility removes the justification for others’ nonperformance and they should receive the same funeral rites as a non-martyr. However, despite this narrow construction, Ibn Muflīḥ does not require this and treats them like martyrs.⁷⁶³

⁷⁵⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 33.

⁷⁶⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 33.

⁷⁶¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 35.

⁷⁶² Ghazālī, *al-Wasīṭ*, vol. 2, 377.

⁷⁶³ Ibn Muflīḥ, *Kitāb al-Furū‘*, vol. 3, 296. This was also the opinion of Abū al-Ma‘ālī. Ibid.

For the remaining two funerary duties, while the obligation to bury the martyr is widely agreed upon by jurists, there is a difference of opinion as to whether shrouding should take place or not. One group of jurists believed martyrs should be shrouded, while others required them to be buried in their clothes. Māwardī obligates both shrouding and burial of martyrs. His position is that after a person dies their clothes become the property of their guardian (*walī*). It is up to the guardian to decide whether to bury the martyr in those clothes or not.⁷⁶⁴ Māwardī discusses opposition to his position by citing Abū Ḥanīfa, who did not give guardians this right and required martyrs to be buried in the clothes they died in.⁷⁶⁵ Ibn Ḥazm supports this position, requiring burial, but not washing or shrouding. Instead, he says they should be buried “with their blood and clothes.”⁷⁶⁶ Ghazālī also says that martyrs should be buried like everyone else, except that their “blood stained clothes” should not be removed (though coarse garments are an exception).⁷⁶⁷ In responding to these other opinions, Māwardī offers historical precedent

⁷⁶⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 35.

⁷⁶⁵ Māwardī, vol. 3, 35.

⁷⁶⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 115 and 138. The only thing he requires being removed from them is their weapons. *Ibid.*, 115.

⁷⁶⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 380. Shields should also not be removed. *Ibid.*

for his position. When Ḥamza, the Prophet's uncle, was killed in battle his daughter brought white pieces of cloth to shroud him in and removed his battle clothes.⁷⁶⁸

Even those who agreed that martyrs in a war with the polytheists should not be washed disagreed with regard to people martyred by bandits (*luṣūṣ*) or by non-polytheists (*ghayr ahl al-shirk*). Awzā'ī and Aḥmad b. Ḥanbal agreed that the victims of such persons should be treated in the same manner as those who were killed by the polytheists; Mālik and Shāfi'ī said that they should receive the ritual washing.⁷⁶⁹ The difference between them revolves around whether the suspension of the duty to perform a ritual washing is for every martyr without exception or only those martyrs who are killed by nonbelievers. Those who say it is for every martyr without exception apply it across the board for everyone the Prophet explicitly stated was a martyr, including those who did not die on the battlefield. Others consider the suspension to be more limited, only applying it to a specific type of martyr: the ones killed by nonbelievers and on the battlefield.⁷⁷⁰

Within the discussion on funerary duties for martyrs, the assumptions that structure discussions of funerary duties owed to martyrs have to do with how and where

⁷⁶⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 35.

⁷⁶⁹ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

⁷⁷⁰ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

the individual died. As noted earlier, there is a baseline assumption that a martyr is someone who died while *fighting*, that the fight was against *disbelievers* and that their death occurred on the *battlefield*. However, jurists are fully aware of the fact that various other situations can arise that alter the manner in which the martyr died, for instance the location of their death. Hence, they are concerned with determining how broadly to apply the label of martyr: who qualifies for martyrdom and what is the definition of a martyr? Through this definition they regulate what constitutes a “Muslim hero” for the community. For instance, one common situation involves a fighter being injured on the battlefield but dying while receiving treatment away from battle or subsequent to the conclusion of war. Should they be considered martyrs? If so, what type of funerary duties are they owed? And, if the funerary duties are different than those owed to a battlefield martyr then what does this say about the role of practical necessity in determining guidelines for these duties?

Jurists opine on the injured fighter who dies away from the battlefield. Ibn Rushd claims a consensus among jurists that any Muslim not killed on the battlefield fighting nonbelievers should, unlike other martyrs, receive the ritual washing.⁷⁷¹ Ibn Ḥazm notes that if a person is wounded on the battlefield but dies after being carried off the field,

⁷⁷¹ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 226.

one may still wash and shroud him.⁷⁷² Ghazālī acknowledges the existence of conflicting opinions with regard to injured fighters who die after removal from the battlefield, but fails to elaborate further.⁷⁷³ Māwardī provides a more robust framework, discussing three scenarios in which fighters die away from the battlefield. In the first, a fighter is injured in battle, then rescued but dies as a result of his injuries while the war is still ongoing.⁷⁷⁴ In the second, the injured fighter is rescued but dies shortly after (*bi-zamān qarīb*) the war concludes. In both these scenarios, Māwardī does not allow the fighter to be washed or prayed over, just like those killed in battle.⁷⁷⁵ The third scenario he describes is one where a fighter is injured during battle, dies after the war concludes, but his body is not discovered for a “long time after” (*zamān ba‘īd*). In this case, he requires both washing and prayer to be performed.⁷⁷⁶ Some jurists condition the duties performed on whether the injured fighter is able to consume food or not; food consumption also serves as a proxy for both the severity of the injury and the extent of time after war where someone’s injury will be still be considered a battlefield death. Hence, Abū Ḥanīfa reportedly said that an injured fighter who dies without eating anything (because their

⁷⁷² Ibn Ḥazm, *Muḥallā*, vol. 5, 115.

⁷⁷³ Ghazālī, *al-Wasīṭ*, vol. 2, 377.

⁷⁷⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 35.

⁷⁷⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 35-36.

⁷⁷⁶ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

injury is so severe) should not be washed (*idhā māta qabl akl al-ṭaʿām lam yughsal*).

However, if he dies after eating something then the ritual washing should take place.⁷⁷⁷

In addition to the injured fighters, there are also individuals who are removed from the battlefield because of capture then subsequently die in captivity. The question arises whether they are also entitled to a suspension of duties or should receive all the funeral rites. Māwardī discusses the situation where a fighter is captured by nonbelievers, then dies (or is killed) and the body is presumably returned to the Muslims.⁷⁷⁸ He says there are two opinions about the funerary duties owed to this individual, each analogized from different parts of the general funerary duty framework. The first opinion holds that one should wash and pray over them just as one would for an injured person who is rescued from the battlefield and subsequently dies. This is because, just like the injured fighter, in this case the “spirit departed [the body when it was] away from the battle” (*khurūj rūhihi fī ghayr al-muʿtarak*): they should have funerary duties performed.⁷⁷⁹ The other opinion is that the dead captive should be treated like a

⁷⁷⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36. Māwardī notes that support for this position is the death of ʿUbayda b. al-Ḥārith who was struck in the leg at the Battle of Badr, but lived on afterwards until he died of yellow fever. The Prophet washed him and prayed over him. Ibid.

⁷⁷⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

⁷⁷⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

martyr on the battlefield, neither washed nor prayed over, because his death occurred unjustly at the hands of a disbelieving combatant.⁷⁸⁰

Ibn Rushd asks an additional question with regard to non-Muslim children who are captured and die in captivity. Does age alter the duties owed to a captive even if they are non-Muslim (*al-atfāl al-musabbayn*)?⁷⁸¹ He notes that Mālik and Shafi‘ī held the same opinion on the matter with one difference. They both agreed that you should not pray over a child unless he is at an age where he can grasp what Islam is (*ya‘qil al-Islām*). This is the case regardless of whether the child is captured along with his parents or separately from them.⁷⁸² At this point, Mālik and Shafi‘ī diverge. Mālik argues that the ruling for the parents will be followed for the child unless the father converts to Islam; in that case, the child will follow the father’s ruling.⁷⁸³ This would not be the case if the mother converted. For Shafi‘ī, the ruling for the child will follow either of the two parents who convert to Islam.⁷⁸⁴ Abū Ḥanīfa requires prayer over the non-Muslim child because the ruling (*ḥukm*) for it is based on whoever captures it.⁷⁸⁵ Awazā‘ī says that if

⁷⁸⁰ Māwardī, vol. 3, 36.

⁷⁸¹ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸² Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸³ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸⁴ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸⁵ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

Muslims end up buying these non-Muslim children while they are captives and unaccompanied, then funeral prayers must be performed for them.⁷⁸⁶ If the minor is not alone, but rather a captive along with his non-Muslim father, then no duty is owed to them because their ruling is that of their parents.⁷⁸⁷ The difference is based on whether nonbelieving children will be saved (*ahl al-jannah*) or damned (*ahl al-nār*). Some jurists hold that their fate is the same as their disbelieving parents, while others cite the Prophetic tradition that “every being is born with an innate disposition for religion (*fitra*); in other words, they should be treated like believers because they have not yet become disconnected from their original situation at birth.”⁷⁸⁸

Jurists also discuss the question of martyrdom and the associated funerary duties for those individuals that are killed *outside* the context of war, but might still be considered martyrs. Shāfi‘ī mentions the case of the caliph ‘Umar, who was not killed in battle, but was still considered a martyr, but was washed and prayed over.⁷⁸⁹ Ibn Ḥazm provides a short list of non-conflict martyrs: those who die due to an intestinal ailment

⁷⁸⁶ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸⁸ Ibn Rushd, *Bidāyat al-mujtahid*, vol.1, 241.

⁷⁸⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 33. Regarding this report, Ibn Rushd says that it is reported that ‘Umar received all the funeral rites “and was martyred.” Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

(*mabṭūn*), the plague-stricken (*maṭʿūn*), drowned (*gharīq*), burned (*ḥarīq*), etc.⁷⁹⁰ He argues that there is scholarly agreement that not only did the Prophet classify these people as martyrs, but he also shrouded and washed them during his lifetime.⁷⁹¹ Furthermore, Ibn Ḥazm notes that ʿUmar, ʿUthmān and ʿAlī were all martyrs, who were washed, shrouded and had prayers said over them.⁷⁹² Ghazālī also attaches the label of martyr more broadly; for instance, he considers any person, Muslim or *dhimmi*, who is killed “unjustly” to be a martyr, as are those who die from intestinal afflictions or those killed while foreigners (*gharīb*) in another land. However, unlike other martyrs, he says that all these people should be “prayed over” even though they are “considered martyrs.”⁷⁹³ Māwardī holds a similar opinion regarding those killed unjustly and cites the Prophet as saying that if “someone is killed unjustly then it is obligatory to pray over them as you would for someone who was not killed in battle” (*li-annahū qūtila ḡulman fa-wajaba an yuṣallā ʿalayhi ka-man qūtila fī ḡhayr al-muʿtarak*).⁷⁹⁴ Like Ibn Ḥazm, he also notes other categories of people who should be treated like martyrs and require no funeral rites: those who die by

⁷⁹⁰ Ibn Ḥazm, *Muḥallā*, vol. 5, 116.

⁷⁹¹ Ibn Ḥazm, *Muḥallā*, vol. 5, 116.

⁷⁹² Ibn Ḥazm, *Muḥallā*, vol. 5, 116.

⁷⁹³ Ghazālī, *al-Wasīṭ*, vol. 2, 377-378. Ibn Ḥazm takes a more neutral position on whether or not to pray for martyrs, classifying both praying or not praying as good (*ḥasan*) acts.⁷⁹³ As for the issue of someone who later dies away from the battle of wounds suffered on the battlefield, Ibn Ḥazm permits praying over them. Ibn Ḥazm, *Muḥallā*, vol. 5, 115.

⁷⁹⁴ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 34.

drowning, by fire, are crushed to death (*taḥt hadm*), assassinated (*qutila ghīlatan*) or killed while being robbed (*qatalahu al-luṣūṣ*).⁷⁹⁵

Both practical and symbolic considerations play a role in the distinction between duties for battlefield martyrs versus non-battlefield martyrs: the absence of war zone conditions permits the performance of funerary duties, but also eliminates the need to specially commemorate the dead. For instance, burying martyrs in “blood-stained clothes” is the most reasonable course of action in the context of war when their bodies are not going to be ritually bathed, shrouds are not readily available, and the enemy has the potential to attack. Likewise, it is instructive that the final location of the fighter’s death plays a significant role for many jurists in what funerary duties, if any, should be performed. The fact that funerary duties are no longer suspended if one is removed from the battlefield suggests that for many jurists the practical needs of war were a major consideration.

However, jurists are unsatisfied with simply practical justifications for these rules. The ritual celebration of martyrdom necessarily involves remaining in a context with all the markings of battle. They want to attach more meaning to why the standard funerary duties are not performed for martyrs. For instance, Māwardī offers one

⁷⁹⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

explanation for nonperformance by means of a creative reading of Q 3/al-‘Imrān: 169.⁷⁹⁶

This verse says that martyrs should not be thought of as “dead” but “alive with their Lord.”⁷⁹⁷ Hence, Māwardī argues that since funeral prayers can only be carried out for the dead and the Qur’ān clearly states that martyrs are not dead, they don’t need expiation or a plea for forgiveness for their transgressions.⁷⁹⁸ He applies the same logic to ritual washing and shrouding. However, Māwardī conspicuously does not apply it to burial and offers no explanation as to why burial rights should be conferred on martyrs if they are considered alive. While there is clearly a distinction being made between corporeal death of the body (which everyone experiences) and complete death of both body and soul (which martyrs *do not* experience), it is not clear why this distinction

⁷⁹⁶ A similar verse occurs in Q 2/al-Baqarah: 154: “Do not say that those who are killed in God’s cause are dead; they are alive, though you do not realize it.”

⁷⁹⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36. The relevant part of the verse reads: “...do not think of those who have been killed in God’s way as dead. They are alive with their Lord...” In his commentary on the Qur’ān, Ṭabarī says this is in reference to the martyrs from Badr and Uhud, who are considered literally to be alive. He quotes several ḥadīth that speak of the Prophet describing those who were killed as having their “spirits placed inside green birds that return to the rivers of Paradise, eat from its fruits and nestle by golden lamps in the shade of the [Divine] Throne” (*arwāḥuhum fī ajwāf ṭayr khuḍr tarid anḥār al-jannah ta’kul min thimāriḥā wa-ta’wī ilā qanādīl min dhahab fī ḡilli al-‘arsh*). Ibn Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī jāmi‘ al-bayān ‘an ta’wīl āy al-Qur’ān*, vol. 6, ed. ‘Abd Allāh b. ‘Abd al-Muḥsin al-Turkī (Cairo: Markaz al-buḥūth wa-dirāsāt al-‘arabiyya wa-l-Islāmiyya, 2001), 228-236. For similar opinions, see also, Aḥmad al-Wāḥidī al-Naysābūrī, *Asbāb al-Nuzūl* (Beirut: ‘Ālam al-Kutub, n.a.), 95-96; Ibn Abī Zamanayn, *Tafsīr al-Qur’ān al-‘azīz*, vol. 1, ed. Ḥusayn b. ‘Ukāsha and Muḥammad b. Muṣṭafā al-Kanz (Cairo: al-Fārūq al-Ḥadītha, 2001), 333-334. In his commentary to the related verse Q 2/al-Baqarah: 154, Ṭabarī explicitly states that the martyrs will receive sustenance from Paradise “prior to their resurrection” (*qabl ba‘thihim*). Ṭabarī, *Tafsīr*, vol. 2, 701.

⁷⁹⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

explains the negation of all the funerary duties except for one. Why is a martyr considered “alive” for three funerary duties, but “dead” for another?

In some respects, this further highlights the theme running through the chapter of jurists seeking piecemeal symmetry not holistic consistency in their explanation of *kifāya*-duties. As long as their logic enables them to solve some of the dilemmas they are presented with, jurists are content to continue utilizing that logic regardless of other theoretical challenges it might pose. Hence, ethereal life in a hidden plane of existence allows them to produce a satisfactory explanation for suspending funeral rites for opposite ends of a spectrum: believers who have made the ultimate sacrifice for the faith and disbelievers who are the antithesis of the faith. Yet, jurists ignore the issue of burial even though it poses a serious challenge to the completion of their reasoning. How is it possible that for certain funeral rites the deceased is considered “alive” due to their martyr status, but for burial they are considered dead?

Another important meaning that jurists apply to these situations involves purity and centers on two aspects. First, they want symmetry between the performance of funerary duties and rules around ritual purity for the living. Second, some discuss what we might term a “sacred” purity that comes with martyrdom; where the very status of martyr is itself purifying. With regard to the first aspect, Ghazālī notes that one of the

ways in which a martyr can be distinguished from others is that washing a martyr would be a violation of his rights even if he is in a state of impurity (*fa-innahu ḥarāmun fi ḥaqqihi wa-in kāna junuban*), whereas for everyone else it would be the opposite.⁷⁹⁹ Māwardī raises the issue in a discussion on what should happen to women and children that die in battle with disbelievers. He contends that they should not be washed or prayed over, similar to mature men (*al-rijāl al-bālighīn*) who are killed in battle.⁸⁰⁰ Abū Ḥanīfa reportedly agreed with this position as it relates to women but disagreed with regard to children, who he felt should be washed and prayed over. His argument is based on purity. Essentially, he says suspension of funeral rites, such as washing, are a cleansing from God (*taṭhīr min Allāh*). However, since children are sinless they do not require this cleansing (*la yalḥaquhu al-taṭhīr*), thus funerary duties should *not* be suspended for them.⁸⁰¹ Māwardī disagrees with this reasoning, arguing that matters of purity and removal of impurities are not obligatory for the child till he reaches puberty. Since the washing is suspended even for people who have purity obligations during their lifetime, it is even less necessary for

⁷⁹⁹ Ghazālī, *al-Wasīṭ*, vol. 2, 379. For some, like al-Ḥasan and Saʿīd b. al-Musayyab, every Muslim should be washed because every dead body is in a state of actual impurity (*kull mayyit yujannib*). In terms of historical precedent against this, specifically the nonperformance of funeral rites for the dead at ʿUḥud, Ibn Rushd believes these jurists considered that a response to the necessity of the situation given the difficulties of performing rites in that context. Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

⁸⁰⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

⁸⁰¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

children, who have no such obligations in their life.⁸⁰² He also disagrees with the idea that suspension of washing is a cleansing from God, noting instead that suspending the duties is an exception arising out of God's generosity (*istaghna bi-karāmat Allāh*).⁸⁰³

Ghazālī is particularly concerned with attaching greater meaning to the suspension of funeral rites for martyrs and uses his rhetoric to emphasize this point. He cites a ḥadīth that says martyrs should be wrapped with “their wounds and their blood” because they will be “resurrected on the Day of Judgment and brought forth with their blood.” He is especially laudatory in his remarks about their resurrection. He speaks of them being brought forth dressed in the color of blood (*lawn al-dam*) and emitting the fragrance of musk (*rīḥ al-misk*).⁸⁰⁴ Ghazālī's language is instructive on how the martyr's blood is purifying. The blood takes the place of water, performing the same function of removing impurities in order to cleanse, except the martyr's blood not only negates the impurity of everything on the body it also negates the fundamental impurity of blood itself. Moreover, it both plays the role of water and that of musk. While not obligatory, jurists speak of adorning the deceased with musk as a way of purifying their scent as well.

⁸⁰² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

⁸⁰³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 36.

⁸⁰⁴ Ghazālī, *al-Wasīṭ*, vol. 2, 379.

For the martyr, Ghazālī suggests his blood serves this function.⁸⁰⁵ In this way then he reimagines blood, a cause of ritual impurity, as a purifying element; a status blood only acquired based on the deceased's classification as a martyr.⁸⁰⁶

Another question that arises is what action must be taken regarding other impurities, aside from blood, that may be on the martyr's body. These impurities may have come about during battle or existed prior to battle. Does blood purify these other impurities as well? Ghazālī says there are three perspectives on this. The first advocates for removing these impurities because they “erase the signs of martyrdom” (*al-muʿfū ʿanhu athar al-shahāda*).⁸⁰⁷ The second opinion believes these impurities should not be removed because that process would also remove the signs of martyrdom. Finally, there is the perspective that takes a position between the two. If removing impurities will result in removing the blood, then they should not be removed; however, if that will not occur, then removing impurities is permitted.⁸⁰⁸ This again reinforces the idea that blood

⁸⁰⁵ Ghazālī, *al-Wasīṭ*, vol. 2, 379.

⁸⁰⁶ Ghazālī, *al-Wasīṭ*, vol. 2, 379. This contrasts with how blood has been discussed in academic studies of purity. For instance, Marion Katz speaks of blood as *najāsa*, and notes that these are “substances or beings that are inherently impure.” She goes on to state that “something that is substantively impure or *najis*, can never be rendered pure; it is essentially and unalterably defiling.” Katz, *Body of Text*, 2. However, the case of martyr's blood directly contradicts this and is an exception to Katz's general account. See, A. Kevin Reinhart, “Impurity/No Danger,” *History of Religions*, vol. 30, no. 1 (1990): 7fn16.

⁸⁰⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 379-380.

⁸⁰⁸ Ghazālī, *al-Wasīṭ*, vol. 2, 379-380.

carries a level of sacredness and not washing the martyr has to do with more than just cleanliness otherwise removing blood along with other impurities would not be an issue. The martyr's blood attains a distinct status: not like other impurities, let alone like blood itself.

For those who advocate washing martyrs who entered war with impurities, the rationale is fairly straightforward. There is agreement that they should not be prayed over. For his part, Shāfi'ī says there is no proof text to support obligating their washing, but his disciples disagreed about this.⁸⁰⁹ Ibn Surayj said it is obligatory to wash them because of the ritual impurity not because of their death (*yajib ghusluhu li-l-janāba la li-l-mawt*); this is also Mālik's position. The textual basis for this position is a situation described in a Prophetic tradition about the martyr Ḥanzalah al-Rāhib being washed by angels after he was killed at Uḥud.⁸¹⁰ The Prophet inquired about his circumstances, arguably to understand the reason for this strange occurrence of angels washing a

⁸⁰⁹ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 36.

⁸¹⁰ Māwardī, *al-Ḥawī al-kabīr*, vol. 3, 36-37. Ḥanzalah al-Rāhib is better known as Ḥanzalah b. Abī 'Āmir. Ibn Sa'd reports that Ḥanzalah married Jamīlah bint 'Abd Allāh b. Abī b. Salūl and their wedding night was the night before Uḥud. He was intimate with his wife that night and left for the battle in the morning still in a state of impurity. He was subsequently killed in battle. Ibn Sa'd, *Kitāb al-Ṭabaqāt al-Kabīr*, vol. 4, ed. 'Alī Muḥammad 'Amr (Cairo: Maktabat al-khanji, 2001), 290-291.

human's body. People reported that Ḥanzalah was with his wife before he left for battle and in a state of ritual impurity (*kharaja ilā al-ḥarb junuban*) and required cleansing.⁸¹¹

This position also seeks symmetry between life and death. It argues that when the circumstances are such that it would be necessary to wash the deceased's entire body had they been alive, then that is what should also be done after they are killed. The obligation that existed prior to death is not suspended because of death. Others who say it is not obligatory to wash argue that the person who is alive and in a state of ritual impurity only purifies themselves in order to be able to pray.⁸¹² However, the non-martyred deceased is washed so that they can be prayed over. The case of one who is killed in a state of impurity involves a situation where prayer could not be performed over them (since they are martyrs), thus washing them becomes pointless (*lā ma'nā li-ghuslihi*).⁸¹³

⁸¹¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 37.

⁸¹² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 37.

⁸¹³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 37. Māwardī outlines a distinction here between the types of impurities that exist and what different obligations they trigger. He is primarily speaking of substantive impurity (*najāsa*) versus personal impurity (*janāba*). While there are various ways in which these two impurities are distinct, here Māwardī seems to associate personal impurity as the greater impurity requiring washing of the entire body while substantive impurity just requires ablution. Hence, he says that if you are removing substantive impurity in order to erase signs of martyrdom then this is unnecessary and should be dispensed with. If it is because of reasons other than martyrdom then you are permitted to wash the body. Māwardī notes that the difference between substantive and personal impurity is that when you require removing a little substantive impurity you are also required to remove most of it whereas "whenever you are not required to remove a small personal impurity then you are not required to remove a larger one" (*wa-lammā lam yajib izālat al-ḥadath al-aṣghar lam yajib izālat al-akbar*). In

Concluding Thoughts

As noted at the outset of this chapter, funerary duties are a unique part of the category of *kifāya*-duties. They have no basis in the Qur'ānic text for their existence other than a tangential reference in one verse. Their periodic mention in ḥadīth literature is the primary source of prooftexts for the duties, but are not extensive enough to explain why they were universally considered part of the original *kifāya*-duties. Yet, it is not unusual that such a significant act of communal responsibility as conferring final rites upon the dead should be included in the original duties. These are acts that cannot be performed by the individual who requires them; the deceased are completely reliant on the performance of others. Unlike *jihād* or duties to rescue where an individual can step up to fulfill the duty for themselves and others, in the funeral context the deceased plays no role and requires assistance.

In addition, certain themes emerge within the discussion of these duties that prove useful for understanding the juristic thought process, the types of juristic reasoning they employ and the overarching goals that might influence their thinking.

the context of personal impurity there are no degrees. Ibid. For more on substantive versus personal impurity, see Katz, *Body of Text*, 146-149.

For instance, jurists consistently try to find symmetry through analogy between rules they create for the living and those for the dead. As a result, they match rules for funeral washing and who is required to perform them with parallel rules for ablutions and post-intercourse washing for the living. Often they will raise an issue, like using perfume on a dead body, and apply a straightforward rule on symmetry: since it is not required that a living person wear perfume, it cannot be required that the dead do so.

Similarly, jurists are concerned with pursuing objectives that lend purpose to these duties beyond the functional role they might play. Issues of purity dominate the discourse as do questions of process and hierarchy. In the latter case, jurists create priorities with regard to performance even as they establish a broad obligation for a larger group of people. This hierarchy overlaps with the concurrent discussion around purity since preference is often based on what may be perceived to be a “purer” relationship between the deceased and the potential performer of the duty.

Between Functionality and Meta-Meaning

An area that jurists spend a significant amount of time on is balancing between the practical or functional necessity and the desire for meta-meaning. Ritual washing is the most illustrative example since its apparent objective should be to achieve physical

cleanliness.⁸¹⁴ However, there is also an aspect of “purity” beyond the cleansing achieved by washing. Some jurists, like Ibn Mufliḥ will state categorically that the “purpose of washing is cleanliness.”⁸¹⁵ Kāsānī will also note that the purpose of washing is to “remove any ritual impurities (*ḥadath*)” and since this can be achieved in one washing he will set that as the minimum.⁸¹⁶ However, Ibn Rushd notes that jurists differed as to whether the actual purpose was physical cleanliness or not. In particular, they contend with a report of the Prophet requiring his uncle, a nonbeliever, to be washed when he passed. Jurists argue that if this was a ritual washing, then it is not permissible to wash a nonbeliever. However, if it was simply for cleanliness then it is permissible to wash him.⁸¹⁷ In some respects then, jurists must allow for both purposes to function at the same time. If they only allow washing for the sake of cleanliness, then there is seemingly no difference between the rites performed upon a believer versus a nonbeliever.

A question also arises as to whether a functional or meta-meaning approach is to be utilized in the context of washing during rainfall or after drowning. This situation

⁸¹⁴ Reinhart makes the same argument with regard to ablution, noting that it is “not cleanliness in the hygienic sense, but, rather, in the ritual sense” that is at stake here. Hence, even if a person is very clean, but their ablution has been negated, they are not permitted to worship. Reinhart, “Impurity/No Danger,” 6.

⁸¹⁵ Ibn Mufliḥ, *Kitāb al-Furūʿ*, vol. 3, 293.

⁸¹⁶ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 300.

⁸¹⁷ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 227.

poses even greater difficulty for those jurists who wish to argue for a greater purpose to the ritual washing beyond physical cleanliness. Since cleanliness has presumably occurred due to immersion in water, a greater purpose would mean performing an additional washing on a body that is already “clean.” Most jurists do not find this additional step necessary. Thus, Kāsānī notes that if a dead body is found immersed in falling rain, it is not permissible to perform a washing. The obligation is connected to the actual act of washing and this is no longer an option during rainfall: you cannot clean a body that has already been washed.⁸¹⁸ Likewise, he notes that if a person drowns then their body should be shaken to remove excess water, but the obligation to perform a ritual washing is suspended.⁸¹⁹ Māwardī agrees stating that if a deceased is washed by “flood waters” (*ṣayl*) or “rain” (*maṭar*) then you are not permitted to wash him. He reasons that the obligation is not on the deceased, but on the collective in relation to the deceased (*al-ghusl la yajib ‘alā al-mayyit wa-innamā yajib ‘alaynā fī al-mayyit*).⁸²⁰ Hence, if the flood water and rain have already accomplished the washing then it is not necessary to perform an additional washing since the “act required of us is no longer possible.”⁸²¹ He

⁸¹⁸ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 300.

⁸¹⁹ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 300.

⁸²⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 17.

⁸²¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 17. Another interesting point Māwardī raises, which is tangential to the discussion here, relates to intention. He asks whether it is obligatory to have a particular intent

notes the same is true for a drowned person. This returns to a point raised much earlier in Chapter One on the *kifāya*-doctrine and how the obligation is suspended due to the absence of a reason to perform.

Structuring the Duty: Process and Hierarchy

Aside from the issue of whether rules for the duties are developed for pragmatic reasons versus symbolic ones, there is also a question of process and hierarchy. Two main hierarchies exist in the framework of funerary duties: those relating to performance and those relating to performers. Hence, while these are *kifāya*-duties that fall within the responsibility of the entire collective, there are certain people whose obligation takes precedence over others. Similarly, the steps in the performance of the actual duty must occur in a particular order.

Beginning with the preference for certain performers, jurists center the hierarchy of performance on a number of factors. The primary concern is with maintaining a measure of modesty for the dead particularly in the context of ritual

before performing the washing. There are two opinions he notes in this regard. The first says that intention is obligatory because it is required for ablution and ablution is a step within the ritual washing of the deceased. The second says that intention is not necessary because this is a *kifāya*-duty and it is not specific to any one person, such that their intention becomes a required component of the performance. Ibid.

washing. Hence, they frame their discussion around kinship and gender, as key pivot points for societal modesty. However, modesty is not the only concern. Jurists still pursue the symmetry between life and death discussed earlier. Religion also arises as an important consideration and for some jurists it supersedes kinship, thus asserting the primacy of the moral community. In this regard, there is a related preference given to individuals who possess lauded personality traits, such as trustworthiness, thus suggesting that in addition to modesty there is a particular communal ethos and character, connected to religion, which is consciously being promoted and which transcends kinship.

For example, in the context of ritual washing, Shīrāzī says the order of preference for a deceased male is his “father, grandfather, son, tribe, men outside his tribe, wife and then female relatives.”⁸²² As for a deceased woman, first are “female relatives” then “non-relative females,” her husband, male relatives (with an additional preference for those who are *maḥram*).⁸²³ Ghazālī gives the same order of preference for women.⁸²⁴ However,

⁸²² Shīrāzī, *Tanbīh*, 35. Shāshī reports Abū Ḥanīfa as saying that the order is “father, grandfather, son, grandson, brother, nephew, uncle, uncle’s son, then mother.” Shāshī, *Ḥilyat al-‘Ulamā’*, vol. 1, 287. This is also Shāshī’s position, except that he says the scenario is when there is no wife present. If the wife is present then she is permitted to wash her husband before everyone else. Ibid., 283.

⁸²³ Shāshī, *Ḥilyat al-‘Ulamā’*, vol. 1, 287.

⁸²⁴ Ghazālī, *al-Wasīṭ*, vol. 2, 367.

he says that while the order *between* men and women is obligatory, the order *within* each category can vary.⁸²⁵ Hence, he notes that “Iraqi” jurists give preference to husbands over female relatives because they argue those men have already seen what the women have not seen: the deceased’s nakedness.⁸²⁶ He also mentions the argument some jurists make for male relatives getting preference over husbands because death severs the marital tie thus rendering the husband a stranger.⁸²⁷ As a stranger he is treated as any other non-relative male. This is an interesting distinction since one approach emphasizes familiarity resulting from kinship as a governing principle while the other is focused on familiarity arising out of a contractual relationship.

Ibn Mufliḥ notes that an important additional condition that supersedes kinship ties is that the person carrying out the duty should be Muslim. He says it is not permitted for a non-Muslim to perform the ritual washing of a deceased Muslim.⁸²⁸ Furthermore, among Muslims, he says that the best person to do the washing is someone who is trustworthy (*thiqa*) and knowledgeable about the rules of washing. In fact, he notes that

⁸²⁵ Ghazālī, *al-Wasīṭ*, vol. 2, 368.

⁸²⁶ Ghazālī, *al-Wasīṭ*, vol. 2, 367.

⁸²⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 367. Shāshī reports that Abū Ḥanīfa had a similar view, stating that a wife can wash her husband, but the husband cannot wash her. Furthermore, if he dies during her *idda* period, then she cannot wash him. Shāshī, *Ḥilyat al-‘Ulamā’*, vol. 1, 283.

⁸²⁸ Ibn Mufliḥ, *Kitāb al-Furū’*, vol. 3, 275.

Abū al-Maʿālī (a reference to al-Juwaynī) considers this obligatory.⁸²⁹ Ghazālī goes so far as to say that the non-relative Muslim is preferred to the relative who is a nonbeliever.⁸³⁰ Ibn Qudāma also adds another category of performers who supersede any fixed order: those who are appointed by the deceased prior to their death. He cites historical precedent with Abū Bakr al-Ṣiddīq who appointed (*awṣā*) his wife, Asmāʾ b. ʿUmays, to wash him upon his death and she performed this task before anyone else.⁸³¹ Ibn Qudāma notes that the ability to appoint someone to perform the washing at the time of death is the right of the dead (*ḥaqq li-l-mayyit*). This appointed person takes precedence over anyone else.⁸³² After the appointed person, his list is similar to those of other jurists.⁸³³

As for performance of the ritual washing, there are also obligatory steps and minimums that must be observed, which tend to reflect concerns around cleanliness, but also other ritual and symbolic purposes. However, as with priorities relating to performers the issue of modesty is also present with regard to performance and the restrictions around the naked body. Hence, Ibn Muflīḥ says that the body must be washed

⁸²⁹ Ibn Muflīḥ, *Kitāb al-Furūʿ*, vol. 3, 276.

⁸³⁰ Ghazālī, *al-Wasīṭ*, vol. 2, 367.

⁸³¹ Ibn Qudāma, *al-Kāfi*, vol. 2, 11. Another example is Anas b. Mālīk who appointed Muḥammad b. Sīrīn (d. 110/729) to wash him. Ibid.

⁸³² Ibn Qudāma, *al-Kāfi*, vol. 2, 12.

⁸³³ Ibn Qudāma, *al-Kāfi*, vol. 2, 12.

once with clean water in order to satisfy the *kifāya*-duty.⁸³⁴ Kāsānī agrees that the obligation is to only wash the body once, but repeating the process is a *sunna*. Of course, he notes that the single washing must be sufficient to accomplish the purpose of removing any ritual impurities.⁸³⁵ On the other hand, Ibn Ḥazm cites numerous authorities that say the washing must take place three times or an odd number of times more.⁸³⁶ Ghazālī agrees with this, noting that each step in the performance of the washing must occur three times and the minimum amount of water should be what is enough to cover all the limbs, similar to the bath that occurs to remove personal impurity after sex.⁸³⁷ A question that arises here, which does not seem to be taken up by the jurists, is how the additional washing should be considered if the corpse is cleansed of impurities

⁸³⁴ Ibn Muflīḥ, *Kitāb al-Furūʿ*, vol. 3, 275.

⁸³⁵ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 1, 300. This position is similar to how the Ḥanafī *madhhab* considers repetition in the context of *wuḍuʿ*. While they noted that it is obligatory (*farḍ al-ṭahārah*) to “wash the limbs three times” (*ghasl al-aʿḍāʾ al-thalāthah*) this does not mean using “new” water each time; it could simply involve running one’s wet hand over the limbs three times. It is only a *sunna* (*sunan al-ṭahārah*) to “repeat the washing three times” (*takrār al-ghasl ilā al-thalāth*). Qudūrī, *Mukhtaṣar*, 11. For the general Ḥanafī position on this, including present day, see, Wahab al-Zuhaylī, *Al-Fiqh al-Islāmī wa-l-adillatuhu*, vol. 1 (Damascus: Dār al-Fikr, 2000), 394.

⁸³⁶ Ibn Ḥazm, *Muḥallā*, vol. 5, 122. He also says that the water should include cedar and camphor, and, in the absence of water, the dead should be washed with earth. Ibid. Its noteworthy that this could be perceived as Ibn Ḥazm analogizing from *tayammum* to washing the corpse, but it is likely that he is simply indicating that the obligation continues from life to death. In other words, it is not a question of analogizing, but simply performing the same washing that would take place in life and, as in life, doing it with earth when water is absent.

⁸³⁷ Ghazālī, *al-Wasīṭ*, vol. 2, 363.

in a single washing? Are the washings done for a functional purpose (i.e. ensuring complete removal of impurities) or something more symbolic?

Furthermore, Ghazālī requires steps that will remove impurities, but also preserve the deceased’s modesty. Hence, the process includes beginning from the right side, starting at the head, and having each step performed three times, including pressing the stomach to remove any gas or excrements.⁸³⁸ Ibn Qudāma adds an additional condition: he notes that Ibn Ḥanbal expressed a preference for the deceased to be washed with their clothing on and the washer placing their hand under the clothing to wash the body. He notes that al-Qāḍī—likely reference to Abū Ya‘lā Muḥammad b. al-Ḥusayn b. al-Farrā’ (d. 458/1066)—was of the opinion that that the *sunna* is to wash the dead body while they are still wearing a thin shirt (*qamiṣ raqīq*) such that water “passes through it onto the body” and the hand “enters through the shirt’s opening,” passing over the body while water is poured.⁸³⁹

Likewise, with the performance of funeral prayers, there are distinct steps that are obligatory for those who perform the prayers. This includes guidelines for the actual

⁸³⁸ Ghazālī, *al-Wasīṭ*, vol. 2, 365. He also suggests using “cold water” and allows for pressing the stomach more than three times if necessary to remove gas and excrements in the stomach, but there must be an odd number of total presses.

⁸³⁹ Ibn Qudāma, *al-Mughnī*, vol. 3, 368. He claims this is the position of the Shāfi‘ī school as well because they narrate that the Prophet was washed with his shirt on. Ibid.

performance (how many prostrations, etc.), as well as the location of the performance and timing. Ibn Rushd notes that the scholarly positions on different parts of the funeral prayer often map scholarly positions on regular daily prayer. Thus, if a scholar thinks only one *salām* is required at the conclusion of a daily prayer then they will likely only require one for the end of the funeral prayer. Likewise, if jurists think something is obligatory in the daily prayer they will consider it obligatory in the funeral prayer (*in kānat farḍan fa hādhihi farḍ*).⁸⁴⁰ Ibn Ḥazm notes that there is no bowing (*rukūʿ*) or prostration (*sujūd*) in the funeral prayer, nor the adoption of a seated position.⁸⁴¹ Jurists also focus on the number of people necessary for a valid congregation. Ghazālī says that the *kifāya*-duty is only satisfied if there are at least four men praying together or individually for the deceased. The threshold for a deceased woman seems to be less and according to Ghazālī can be as few as one person.⁸⁴² Ibn Qudāma supports this last point for everyone, male or female, noting that one person is sufficient for funeral prayer because he does not consider congregation a condition for the prayer.⁸⁴³

⁸⁴⁰ Ibn Rushd, *Bidāyat al-mujtahid*, vol. 1, 236.

⁸⁴¹ Ibn Ḥazm, *Muḥallā*, vol. 5, 123. He says there are five *takbīrāt*, but four can be done as well. In addition, you only raise your hand in the first and then finish off with two *salāms*. Ibid., 124.

⁸⁴² Ghazālī, *al-Wasit*, vol. 2, 387.

⁸⁴³ Ibn Qudāma, *al-Kāfi*, vol. 2, 37. In fact, he notes that at times the Prophet performed the funeral prayers alone, without any congregants praying behind. Ibid., at 38. He also discusses the question of where the prayer should be performed, but there is nothing obligated on this matter. Hence, he says it is permissible for the funeral prayer to be held inside the mosque because ‘Ā’isha said the Prophet did not

The same dynamic of process and hierarchy occurs in the context of funeral prayer, even when the focus is on state authority. In this scenario, the hierarchy of performers is based on whether a political leader receives preference in performing the obligation in comparison to everyone else. Māwardī quotes Shāfi‘ī as saying that “the legal guardian is more deserving of [leading] the [funeral] prayer as opposed to the governor because this is a private [as opposed to public] matter” (*al-wālī aḥaqqu bi-ṣalāh min al-wālī li-anna hādha min al-umūr al-khāṣṣah*). However, Māwardī notes that this was a newer position for Shāfi‘ī (*madhhab al-Shāfi‘ī fī al-jadīd*), likely an indication of the doctrines developed in Egypt.⁸⁴⁴ On the other hand, his older position (*madhhab al-Shāfi‘ī*

pray over Suhayl b. Bayḍā’ in the mosque, but Abū Bakr and ‘Umar were prayed over in the mosque. Ibid. He also said it is permissible to perform the funeral prayer at the gravesite because this was also done by the Prophet. Ibid., 38.

⁸⁴⁴ Nawawī states that “every issue has two opinions from Shāfi‘ī, new (*jadīd*) and old (*qadīm*).” In general, he says that the newer opinion is controlling and supersedes the older one except in twenty cases that some of Shāfi‘ī’s students prefer the older opinion. Nawawī, *Kitāb al-majmū’ sharḥ al-mahadhdhab lil-Shirāzī*, vol. 1, ed. Muḥammad Najīb Muttiyya (Jeddah: Maktabat al-Irshād, n.a.), 107-108. See also, Joseph E. Lowry, “Ibn Qutayba: The Earliest Witness to al-Shāfi‘ī and his Legal Doctrines,” *Abbasid Studies: Occasional Papers of the School of ‘Abbasid studies* (July 2002): 318; Ahmed El-Shamsy, “Rethinking *Taqlīd* in the Early Shāfi‘ī School,” *Journal of American Oriental Society*, vol. 128, no. 1 (2008): 11. See generally, Lamīn al-Nājī, *Al-Qadīm wa-l-jadīd fī fiqh al-Shāfi‘ī*, vol. 1 & 2 (Egypt: Dār Ibn ‘Affān, 2015). The new and old opinions are thought to represent different stages of the development of Shāfi‘ī’s legal thought. His old (*qadīm*) phase was when he “lived and studied” in Baghdad and the new (*jadīd*) phase was when he “lived and taught” in Egypt. Kevin Jacques, “The Other Rabī’: Biographical Traditions and the Development of Early Shāfi‘ī Authority,” *Islamic Law and Society*, vol. 4, No. 2 (2007): 145. It is possible that the difference between old

fi al-qadīm), from the doctrines developed in Iraq, was similar to Abū Ḥanīfa, and considered the governor of the locality (*wālī al-balad*), as well as higher authorities (*sulṭānuhu*), to have preference in leading the prayer over the deceased in comparison to any of the deceased's relatives (*min sāʾir awliyāʾihi*).⁸⁴⁵ Ibn Qudāma confirms this view, stating that the majority of scholars believe the *amīr* (political leader) should be given preference over the family in leading prayer for the dead.⁸⁴⁶

and new Shāfiʿī positions as it relates to the role of political authority in the performance of communal religious obligations reflects the difference between the contexts in Iraq and Egypt. In the former, the Ḥanafis, with whom Shāfiʿī spent much time, “enjoyed vigorous support of the imperial administration” and that patronage might explain their elevation of the governor’s status in leading the funeral prayer. On the other hand, in Egypt, Shāfiʿī’s ideas faced significant hostility from the “old normative order” allied with the state, possibly forcing Shāfiʿī to reconsider his earlier position. Ahmed El-Shamsy, *Canonization*, 118.

⁸⁴⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 45. Academics continue to debate the role of religion and state during the early Abbasid period. Some view this period as indicating a “definitive and enduring separation between religion and politics” while others argue that political leadership “continued to be recognized...as an active participant in religious life.” Muhammad Qasim Zaman, *Religion and Politics Under the Early ‘Abbāsids: The Emergence of the Proto-Sunni Elite* (Leiden: Brill, 1997), 70. Zaman goes so far as to suggest that, “as far as the proto-Sunni ‘ulamā’ are concerned, it was their *support*, not their opposition to the Abbasids, which was to become the most distinctive feature of their relationship with the caliphs.” Zaman, *‘Abbāsids*, 82. See also, Patricia Crone, *God’s Rule*, 87-98. Hence, Abbasid patronage of the Ḥanafis served multiple purposes. First, it might have contributed to the favored status they gave political authorities in the performance of funerary duties. Second, an alliance with the scholarly class was “good politics” and necessary to neutralize the “extremist” forces that helped them to power. Their takeover created a “rupture in the continuity and prestige” of political authority and allying with other religious actors countered the “extremist” influence in the various groups making up the Abbasid ranks. Ovamir Anjum, *Politics, Law and Community in Islamic Thought: The Taymiyyan Moment* (Cambridge: Cambridge University Press, 2012), 80-81. At the same time, while the well-documented refusal of many scholars, including Abū Ḥanīfa, to associate with political authority indicates possible distrust of the ruler (and surely was perceived as an affront by the ruler), it did not necessarily result in an absolutist position in opposition to religious roles for the ruler.

⁸⁴⁶ Ibn Qudāma, *al-Mughnī*, vol. 3, 406.

The “newer” Shāfi‘ī opinion says that an appropriate person from among the guardians (*al-walī al-munāsib*) of the deceased should receive priority over the political leader (*wālī al-balad*).⁸⁴⁷ This is a rare intra-*madhhab* distinction in the context of funerary duties and possibly indicative of the changing role of political power within Muslim societies and the more pronounced role later jurists articulated for themselves in place of political leadership. After all, if the political leader was not given preference then it stands to reason that the priority would be for those presumed to have the requisite knowledge to carry out the duties: religious scholars. The diminishing role for political leaders in the administration of the law may also be indicative of the altered framing of the law as a whole. In this new framing the traditional enforcement mechanism for the law, political authority, is marginalized but without an explicitly stated replacement. Furthermore, it might also demonstrate how the traditional role that political leaders played in administering religion impacted how religious law came to be understood in later generations.

Māwardī notes that the two groups of Shāfi‘īs rely on different support from the sources. The earlier Shāfi‘īs point to the example of al-Ḥusayn b. ‘Alī who allowed Sa‘īd b. al-‘Ās to lead the prayer for his brother al-Ḥasan stating “if this was not the *sunna* then

⁸⁴⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 45.

I would not have let you go forward.”⁸⁴⁸ The argument is that because this prayer requires a congregation, it is obligatory for the political leader to lead, as is the case for all congregational prayers.⁸⁴⁹ Ibn Qudāma mentions this same precedent, noting that as governor of Medina at the time of Ḥasan’s death, Sa‘īd b. al-‘Āṣ, was required to fulfill this role.⁸⁵⁰ He notes that ‘Alī stated “the Imam has the most right to lead the funeral prayers” (*al-imām aḥaqqu man ṣallā ‘alā al-janāza*) and that there is consensus on this. Hence, the Prophet always led funeral prayers despite the presence of the deceased’s relatives.⁸⁵¹ On the other hand, the later Shāfi‘ī position is based on Q 8/al-Anfāl: 75: “and those of blood relations are more entitled according to God’s decree.”⁸⁵² Thus, they argue

⁸⁴⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 45.

⁸⁴⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 45. Māwardī actually sides with the later jurists, explaining that Ḥusayn’s saying reflects a distinction between *sunna* and obligation noting that “it is part of the *sunna* to put the political ruler ahead to lead the prayer out of courtesy (*adab*) as opposed to obligation.” Furthermore, he notes that Sa‘īd actually sought al-Ḥusayn’s permission to lead the prayer; if he had the right to lead the prayer then there would be no need to seek this permission. Ibid.

⁸⁵⁰ Ibn Qudāma, *al-Mughnī*, vol. 3, 407. He also mentions that Aḥmad b. Ḥanbal narrates from ‘Ammār, the *mawla* of Banī Hāshim, that he witnessed the funeral of Umm Kulthūm bint ‘Alī and her son Zayd b. ‘Umar (both of whom died at the same time), and the prayer over them was performed by Sa‘īd b. al-‘Āṣ who was governor of Medina at the time. This despite the fact that there were close to eighty Companions of the Prophet present that day including Ibn ‘Umar, Ḥasan and Ḥusayn. Ibn Qudāma, *al-Mughnī*, vol. 3, 407.

⁸⁵¹ Ibn Qudāma, *al-Mughnī*, vol. 3, 407. It seems evident that a proto-Sunni argument is being made here that privileges the political leader over the family. Specifically, at the time of the Prophet’s death it was Abū Bakr who led the funeral prayer indicating that he was the new political leader. See, Wilferd Madelung, *The Succession to Muhammad: A Study of the Early Caliphate* (Cambridge: Cambridge University Press, 1997) 356 -360.

⁸⁵² Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 45.

that the guardian is more entitled than the political leader and analogize to the case of the marital ceremony (*nikāḥ*) instead of congregational prayer. They create an order of preference based on the *nikāḥ*, where the guardian is given priority, and state that whichever blood relation is put forward in that context is the one put forward for the funeral prayer.⁸⁵³

Juristic Methodology

Finally, a few insights regarding juristic methodology can also be gained from the discourse on funerary duties. In this context, jurists have to contend with the fact that the prime sources of law, the Qurʾān and Sunna, provide limited guidance for developing a framework of obligations. In the context of funerary duties, there are a handful of references in these sources; the rest of the law has to be articulated by the jurist. The manner in which the jurist decides to articulate the law, in the absence of explicit prooftexts, is illustrative of the approach jurists’ employ that infuses their independent opinions with the sacredness of divine law. In other words, in theory, jurists could employ two approaches. One approach would be to recognize that there are a set of limited rules that the Qurʾān and Sunna provide in this space and distinguish that from

⁸⁵³ Māwardī, *al-Ḥāwī al-kabīr*, vol. 3, 45.

additional rules that the jurist is creating. The distinction then acknowledges that the two sets of rules—scripturally based versus juristic creation—should carry different weight: a rule based on scripture obligates performance while a rule created by jurists, without an explicit text, might simply be recommended.

However, this is rarely the approach jurists take, though the Ḥanafīs arguably allude to it in their distinction between *wājib* and *farḍ*.⁸⁵⁴ Instead, law that jurists create without textual support is often afforded the same weight, and sacred status, as law directly from the primary sources. Jurists generally pursue avenues to extend the reach of religious law beyond the scope imagined by the prime sources and in the process maintain the value of their opinions on a broader range of issues. The alternative approach, which I might characterize as “legally minimalist,” is rare: limiting the ability for jurists to extend the reach of religious law by requiring an explicit connection to the primary sources.⁸⁵⁵

⁸⁵⁴ See generally, A. Kevin Reinhart, “Like the Difference between Heaven and Earth:” Ḥanafī and Shāfi‘ī Discussions of *Wājib* and *Farḍ*,” in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 205-234.

⁸⁵⁵ The legal minimalism I refer to is related to the theory of “judicial minimalism” that Cass Sunstein developed which argues that judges on the U.S. Supreme Court more often than not restrain themselves from making decisions that have a broad impact beyond the specific case before them. In other words, they “make deliberate decisions about what should be left unsaid.” See generally, Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999)(specific quote on p. 3). His argument focuses on how this minimalism reduces the burdens of judicial decision making and decreases the frequency of judicial error, but it might also be understood as allowing a

This can be illustrated more clearly by examining how the juristic approach functions in general in the context of martyrdom and funeral rites. The general rule with regard to nonperformance of funerary duties for martyrs is derived from the Prophetic *Sunna*. Additional rules are developed to address how and when nonperformance would be warranted. These rules are primarily developed for practical reasons, but because they are seen as an extension of religious law, the rules are accompanied by rationales connected to sacred symbolism. Hence, despite the fact that *specific* funerary rules are based on practical considerations, as opposed to divine command, they are all marked by a sacredness justified by the initial *general* rule which was derived from a sacred source. Once that initial rule exists, jurists are able to open a doorway to classifying their derivative opinions as sacred as well.

greater variety of legal opinion by withholding a broader opinion on constitutional validity. *See also*, Cass Sunstein, "Problems with Minimalism," *Stanford Law Review*, vol. 58 (April 2006); Cass Sunstein, "Beyond Judicial Minimalism," *Tulsa Law Review*, vol. 43, no. 4 (Summer 2008). Intisar Rabb has discussed Sunstein's theory in the context of al-Juwaynī's (d. 1085) proposed "legal minimalism" for a situation where the legal authorities succeeding the Prophet – the Shī'ī Imāms and Sunnī scholars – disappear. *See generally*, Intisar A. Rabb, "Islamic Legal Minimalism: Legal Maxims and Lawmaking When Jurists Disappear," in *Law and Tradition in Classical Islamic Thought: Studies in Honor of Professor Hossein Modarressi*, eds. Michael Cook, Najam Haider, Intisar Rabb and Asma Sayeed (New York: Palgrave MacMillan, 2013), 145-166. A more closely aligned discussion of what I am suggesting here is raised by Adam Sabra in his discussion on Ibn Ḥazm's legal theory as one that, more than simply literalism, centers around curtailing the jurist's ability to "speak on behalf of God's law." *See*, Adam Sabra, "Ibn Ḥazm's Literalism," 7. Ibn Ḥazm does this by suggesting that the law itself is "finite in scope" and thus the jurist is unable to develop "an infinite range of divine commands and prohibitions." Sabra, "Ibn Ḥazm's Literalism," 10.

CHAPTER FOUR: THE DUTY TO RESCUE

Introduction

As previously noted, the doctrine around *kifāya*-duties was initially discussed and developed around three main acts: participating in military *jihād*, pursuing religious knowledge and performing funeral rites. Of these, *jihād* was arguably the most important as the entire category of collective duties was premised on the Qur’ānic command to fight.⁸⁵⁶ A second duty, the pursuit of religious knowledge (or “knowledge-duty”), arose as a corollary to *jihād* out of a verse authorizing the duty to fight:

Yet it is not right for all the believers to go out [to battle] together: out of each community, a group should go out to gain understanding of the religion, so that they can teach their people when they return and so that they can guard themselves against evil.⁸⁵⁷

The “knowledge-duty” allows some individuals to avoid military service if they acquire and disseminate religious knowledge. Unlike the other duties, the third “original” duty, performing funeral rites, has no Qur’anic textual support justifying its inclusion in the *kifāya* category. Nonetheless, almost without exception, legal literature

⁸⁵⁶ There are various verses containing the imperative to fight. See, supra note 209. As many commentators have observed, in most cases the Qur’ān uses the word *qitāl* for “fighting” as opposed to *jihād*, but this is because *jihād* is a broader category. As some scholars have noted, “in a specifically religious context, and as understood and articulated by almost every Muslim religious scholar past and present...*jihād* has one meaning: to exert one’s effort in fighting the enemies of God by acts or by words.” Mourad and Lindsay, *Sunni Jihad Ideology*, 16.

⁸⁵⁷ Q 9/al-Tawba: 14-15.

classifies performance of funeral rites as a *kifāya*-duty. The link between these three duties is not immediately obvious, but each duty seems to serve overlapping social and religious functions. This is a feature of the *kifāya* category that distinguishes it from many other duties in Islamic law and, in the *kifāya* discourse, jurists routinely justify rules with the legal objective of benefitting society.

Another distinguishing feature of the development of *kifāya*-duties is that they seem to have expanded rapidly in the post-formative period, with jurists more readily classifying certain acts as *kifāya* in comparison to their predecessors. In doing so, they created issues of theoretical consistency for these duties, specifically in relation to accountability for nonperformance. The *kifāya*-doctrine is structured around the idea that while there is shared responsibility for performance, in the absence of performance, everyone is liable for punishment. In the original set of *kifāya*-duties, not only were the acts underlying the duties significant enough to motivate performance, but they were limited in number so easily accounted for and fulfilled. As the category expanded, the number and types of acts considered *kifāya*-duties grew and the burden of performance increased significantly along with the likelihood of nonperformance. Expanded duties actually raised the potential for collective “sin” by increasing the likelihood of non-performance.

This dynamic is best illustrated by the knowledge-duty, which was an original *kifāya*-duty that jurists later expanded. In its initial formulation, the duty centered on the acquisition of religious knowledge, but in the post-formative period jurists broadened it to include various other types of knowledge. For example, the *expanded* knowledge-duty contained expertise in areas, such as, carpentry and alchemy. In theory, a greater range of activities simply accounted for a fuller definition of what constitutes “knowledge.” However, in practice, adding numerous new activities as *kifāya*-duties meant that inevitably there would be nonperformance: the supply of potential performers was not sufficient to meet the demand for performance. As a consequence, acts that were previously labeled “recommended” or “commendable” took on added significance when made “obligatory” because now liability for nonperformance was attached. Classification as a *kifāya*-duty increased society’s overall burden by creating responsibility for the performance of previously “optional” acts.

Bearing the above in mind, the prior two chapters discussed *kifāya*-duties that are extensively treated in the legal literature and focus special attention on practical implementation.⁸⁵⁸ On the other hand, the current chapter examines another *kifāya*-duty,

⁸⁵⁸ For instance, as Leor Halevi notes the “early Islamic funerary law was...prescriptive, and it includes many rules against practices that traditionists despised...Laws of this kind did not come into being in a mental vacuum—they arose in opposition to underlying practices.” Leor Halevi, *Muhammad’s Grave*, 11.

the duty to rescue, which has an associated discourse dominated by numerous theoretical challenges. The duty to rescue plays a seminal role in the *kifāya* category, illustrating how the duties function and providing a platform for a rich discourse on ethics. Hence, exploring duties to rescue is separately useful for two primary reasons. First, it uncovers a pattern within the *kifāya* category that suggests the need to create a subcategory of “rescue” *kifāya*-duties. These duties range from saving someone’s life to more complex notions of rescue. Second, the discourse on these duties goes beyond the practicalities of performance that dominate discussion of other duties. Instead, in this context, jurists utilize different forms of “rescue duties” to explore the ethical underpinnings of the *kifāya* category as a whole. While jurists were consistently concerned with the practical fulfillment of *kifāya*-duties, they were also cognizant of moral dilemmas that accompany these positive duties. In particular, the duty to rescue someone from impending catastrophe offered a compelling case of the challenges that come with positive duties, where performance exposes the rescuer to risk and might require personal sacrifice. The issue is especially salient in cases, arguably the majority, where the rescuer is not responsible for causing the dangerous situation in the first place and only acquires a duty to rescue by happenstance.

Furthermore, a number of ethical questions also arise around burden sharing as it relates to these duties. The duties are collectively owed, but not collectively performed; instead, small numbers of individuals perform the duties for everyone else. Hence, a natural question that arises is: to what extent must an individual make sacrifices on behalf of others? Do they have to risk their lives? Or to a lesser degree, to what extent do they have to compromise their own well-being in some manner by redirecting their time and wealth toward vulnerable third parties? These questions lead to more encompassing inquiries on what members of a given society owe to each other. Or even further, whether there are duties owed simply because someone is a member of the human race.

These questions are fundamental to how any law or legal system accommodates positive duties. As Liam Murphy notes, “legal duties to rescue provide an excellent case study for thinking about the appropriate methodology for moral and political argument about what the substantive content of the law should be.”⁸⁵⁹ Applied to the Islamic context, the duty to rescue is an opportunity for jurists to reveal their aspirations for the law and the unstated principles that guide their construction of legal rules. In particular, while premodern legal treatises tend to focus on rules specifically for Muslims, the duties

⁸⁵⁹ Liam Murphy, “Beneficence, Law and Liberty: The Case of Required Rescue,” *Georgia Law Journal* 89, no. 605 (2000-2001): 610.

to rescue also allow jurists to present perspectives on the law that extend beyond Muslims and expand the moral community. Unlike other *kifāya*-duties that are narrowly constructed, such as funerary duties, the duty to rescue has broad application to all human beings.

Questions of moral obligation and self-sacrifice in relation to other human beings are brought into focus beginning with the quintessential rescue: saving a drowning person. In this scenario, observers on the shore of a river witness an individual drowning in the water. Jurists then pose the question: what are these observers required to do? Do they have to attempt a rescue? In answering the question about moral obligation to the drowning victim, jurists also draw conclusions relevant for other scenarios involving vulnerable individuals. Although the context of drowning involves an emergency requiring immediate attention, the underlying “rescue” provides a premise that is present even where urgency is absent. Hence, this new subset of *kifāya*-duties to rescue includes taking responsibility for foundlings, marrying widows and providing support to the poor.⁸⁶⁰

⁸⁶⁰ In fact, one might imagine stretching the definition further to include the duty to pursue knowledge, which grew in the post-formative period to include socially beneficial knowledge, and arguably contains the same ethos of rescue.

Given the relatively sparse discussion, if any, on practical issues of enforcement or punishment, it is not unreasonable to assume jurists were using rescue duties for moral speculation. In general, matters like enforcing duties and punishing nonperformance are not commonly discussed for *kifāya*-duties, which can be perplexing at times when practical instruction seems warranted. However, for duties to rescue, this type of instruction is unnecessary, as the duty is not addressing a practical problem. There is no pressing issue or burning social problem that requires the law's attention.⁸⁶¹ For instance, it seems unlikely that jurists are developing doctrine on rescuing because of actual drownings where no one attempted a rescue. Similarly, the rules for foundlings are unlikely to be a response to a sudden increase in the discovery of abandoned children. On the other hand, one might argue that funeral rites and *jihād* were acts that required perpetual performance, and thus more practical guidance. Hence, it seems likely that jurists use rescue duties to contemplate the ethical limits of moral action: who is owed a duty to rescue, who is burdened with the duty and how much must an individual sacrifice to fulfill this obligation? In the process, key factors are considered such as immediacy of

⁸⁶¹ In fact, the same absence of a burning need for a legal duty to rescue is cited by modern jurists as to why the entire debate is "somewhat pointless, because so little turns on it in practice." In essence, there is a "low level of need for a legal duty to rescue" because it is the rare "moral monster" who actually fails to perform an easy rescue. Murphy, "Beneficence," 608.

need, proximity to the person requiring rescue, capacity of the potential rescuer, etc. While these factors have practical or functional aspects, the purpose behind the inquiry does not seem to be based on encouraging performance, but determining how the ethical obligation is theoretically altered by these variables.

This type of moral speculation is not unfamiliar to Islamic scholars, especially in discussions of Islamic theology. As Mohammad Fadel notes,

...as a result of the centrality of rational inquiry in the quest for salvation and conceiving the basics of the ethical good life, Islamic theology and ethics placed relatively greater emphasis on the procedural integrity of inquiry rather than its substantive conclusions.⁸⁶²

For instance, Sophia Vasalou's study on Mu'tazilite ethics looks at how they thought about the "moral force or connection" that determined whether administering pain or pleasure on people was "reasonable" and what made "one's conduct a decisive determinant of one's otherworldly destiny."⁸⁶³ They focused on two themes—divine unity (*tawḥīd*) and principles of justice (*ʿadl*)—and Vasalou notes that the topics discussed in the latter:

percolated into seminal streams of Islamic thought and practice to a greater extent than did the theological discussions of divine unity. This was in great part

⁸⁶² Mohammad Fadel, "The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law," *Canadian Journal of Law and Jurisprudence* vol. 21, No.1 (January 2008): 3.

⁸⁶³ Sophia Vasalou, *Moral Agents and their Deserts: The Character of Mu'tazilite Ethics* (Princeton: Princeton University Press, 2008), ix.

a function of the relations these topics bore to legal thought, in which the values of acts were theorized, making works on legal theory (*uṣūl al-fiqh*) and often also substantive law (*fiqh*) vehicles for the expression of theological commitments. This in turn was a reflection of the multiple roles Muslim thinkers frequently bore, for they were never just jurists or theologians but quite often served in both capacities.⁸⁶⁴

In addition, there are also parallels in Muʿtazilite discourse and the question, taken up later, as to whether a duty to rescue can be known outside of revelation or is intuitive. For Muʿtazilites, they argued “moral truths are apprehensible by reason” because the “moral obligation to reflect on the existence of God is a rational one that precedes revelation.”⁸⁶⁵ Furthermore, they also justified their belief that God is “bound by the same code of value as human beings” because “moral values are independent from revelation.”⁸⁶⁶

⁸⁶⁴ Vasalou, *Muʿtazilite Ethics*, 4-5.

⁸⁶⁵ Vasalou, *Muʿtazilite Ethics*, 6.

⁸⁶⁶ Vasalou, *Muʿtazilite Ethics*, 5. It should be noted that this exercise of reason by the Muʿtazilites was subordinate to a “set of clear theological concerns.” Vasalou, *Muʿtazilite Ethics*, 18. Their pursuit of truth was “theological truth” as opposed to a “self-contained ethical one” as some have suggested. Ibid., 28. Sophia Vasalou argues that it would be wrong to “suggest a kinship of purpose” between Muʿtazilite ethics and that of “Greek or British philosophers.” Ibid. As Mairaj Syed notes, the “Muʿtazilites are no more rationalist than the Ashʿarites,” their difference in reasoning rested upon their respective “commitment to certain core positions.” Syed, *Coercion*, 17. Mohammad Fadel argues that because of a “normative pluralism” built into its structure, “Islamic jurisprudence grew to recognize the legitimacy of rule-making based on arguments whose premises—while consistent with revelation—were non-revelatory. Fadel, “Public Reason,” 3.

Similarly, Mairaj Syed explores another area of the jurists' ethical discourse: the question of moral responsibility in contexts where an actor is coerced to do evil. Syed constructs a "constraint" and "contingency" model to understand juristic reasoning and argumentation on this topic. He argues that jurists are at once constrained by features of their "context that are responsive to the logical force of an argument" while at the same time required to account for features that "influence argumentation, but are not reducible to an argument's logical force."⁸⁶⁷ In line with the discussion here, Syed notes that for the topic of coercion, "casuistry, abstract moral and legal principles, and claims regarding coercion's empirical effect on the coerced" are as important, if not more so, than scripture. In fact, he notes that casuistry is the "dominant method of analysis" for Ḥanafī and Shāfi'ī scholars in discussions of coerced rape and murder.⁸⁶⁸

Building on the above discussion, the purpose of these duties to rescue is markedly different from others in the *kifāya* category. Aside from serving as a space for moral speculation, the *kifāya* category may have also been expanded in response to a growing Muslim polity that faced a myriad of novel challenges. Communal life arising out of the heterogeneity produced by assimilating conquered communities into the

⁸⁶⁷ Syed, *Coercion*, 4.

⁸⁶⁸ Syed, *Coercion*, 17.

Muslim polity might have spurred jurists to find ways to produce an overriding cultural ethos that promoted behavior in service of a broader communal purpose.⁸⁶⁹ Hence, the need arose to create new duties for both practical purposes and to encourage social cohesion. As Chase Robinson notes:

For as memories of the foundational periods of prophecy and conquest faded, and as Arab Muslims settled and mixed with non-Arabs in provinces that were at great geographical and cultural distances from Arabia, new bridges had to be built to a past that was at once increasingly remote from, and increasingly significant for, Arab and Muslim identity.⁸⁷⁰

Unfortunately, one can only speculate on the potential external reasons for the creation of these duties as the historical record presently available to us is incomplete and too diffuse to allow a comprehensive examination of the influence of each individual jurist's context. That said, even if the record was greater, more compelling insights can nonetheless be gained from the juristic discourse on duties to rescue. In particular, the

⁸⁶⁹ Ira Lapidus notes that there was a "fundamental assumption of the conquest empire" that the Arab and non-Arab populations would be segregated, but this proved to be "untenable." Instead, they were forced to assimilate together and create new communities based on new identities. Ira Lapidus, *A History of Islamic Societies*, 3rd ed. (New York: Cambridge University Press, 2014), 58-59.

⁸⁷⁰ Chase Robinson, "Conclusion: From formative Islam to classical Islam," in *The New Cambridge History of Islam: Volume 1, The Formation of the Islamic World Sixth to Eleventh Centuries*, ed. Chase Robinson (Cambridge: Cambridge University Press, 2010), 687. He also notes that as "society grew more complex, especially through conversion and acculturation," legal authorities were produced to rationalize and codify "legal practice with reference to a past that they claimed to preserve and interpret." Ibid, 686.

contribution these duties make in helping us uncover the posture of Islamic jurists on ethical and moral questions that transcend any particular context.

The Duty to Rescue in Western Thought

Philosophical speculation through the duty to rescue is not unique to the Islamic tradition and versions of it can be found in older traditions, like Judaism, as well as in modern Western thought. The latter is particularly helpful in setting up a framework for the types of inquiries jurists might make on this topic and the factors favoring or disfavoring the duty. Of course, considering the Islamic duty to rescue in isolation is valuable in itself, but the far-reaching discussions by thinkers in other traditions opens up new avenues of understanding on related concerns that arise in the Islamic legal discourse.

Any inquiry into the duty to rescue must begin by placing it within the category of duties as a whole. Western scholars first distinguish between moral and legal duties, a division that has become more easily delineated in modern discourse, but was more conflated in the premodern period.⁸⁷¹ Immanuel Kant uses coercion (or its absence) as

⁸⁷¹ A reason for this conflation is that the premodern scholar views the purpose of the law like the legal-moralist, as opposed to a Millian liberal. Enforcement of a duty to rescue is to enforce morality “for its own sake,” as opposed to benefiting society. Murphy, “Beneficence,” 630. Interestingly enough, James B.

the premise for the distinction between duties: morality is a duty that is freely fulfilled by a person using “pure practical reason” legislated upon himself while the law imposes the duty.⁸⁷² Moral duties are “inherently social in scope and function” and “allocate shares of social responsibility to individuals” as, essentially, dues for membership in the collective.⁸⁷³ However, while moral duties can be considered duties of beneficence (where benefit is conferred on other members of society), legal rules that mandate conferring benefit present a more complicated proposition.⁸⁷⁴ This points to one of the major criticisms of the duty to rescue: enforced benevolence. The claim is that creating statutes with a duty to rescue would mean getting a positive benefit from others as a matter of right.⁸⁷⁵ For critics, this not only undermines the duty itself, but is deeply problematic from the perspective of individual liberty.

Ames frames the historical relationship in opposite terms, suggesting that “the spirit of reform which during the last six hundred years has been bringing our system of law more and more into harmony with moral principles has not yet achieved its perfect work.” James Barr Ames, “Law and Morals,” *Harvard Law Review* 22, no. 2 (Dec. 1908): 114. My sense is that he is not suggesting that morality played no role in the law previously, but rather that what we considered to be moral before may not have been moral in itself.

⁸⁷² Ernest J. Weinrib, “The Case for a Duty to Rescue,” *Yale Law Journal* 90, no. 2 (Dec. 1980): 266. did not believe that law could make someone virtuous, even though at times the law and one’s internal ethics could legislate the same act; virtue could not be coerced. Weinrib, 266.

⁸⁷³ Joel Feinberg, “The Moral and Legal Responsibility of the Bad Samaritan,” *Criminal Justice Ethics* 3, no. 56 (Winter/Spring 1984): 67.

⁸⁷⁴ Not everyone is comfortable with this idea of moral duties being duties of beneficence because it would mean that those being rescued do not have a right on the rescuer that he take action. Hence, if the rescuer fails to take action, even though this act might have been wrong, they would not have violated anyone’s rights. Murphy, “Beneficence,” 627.

⁸⁷⁵ Feinberg, “Bad Samaritan,” 58 (citing Jeffrie G. Murphy’s opinion on the matter).

In a more pronounced way than his predecessors, the modern jurist is especially mindful of protecting individual liberty when imposing duties. This raises another important distinction helpful for the category of rescue duties: positive versus negative duties. Negative duties tend to be universally accepted and are generally noncontroversial; they are duties *not* to act such that you violate someone else's rights. For example, you have a duty not to kill anyone or steal from them. Generally speaking, these negative duties do not interfere with personal liberty and hence are preferred by critics of the duty to rescue. On the other hand, positive duties present a direct challenge to personal liberty since they are duties of commission, as opposed to omission.⁸⁷⁶ Individuals are asked to sacrifice something they possess—wealth, person, time—on behalf of someone else. Moreover, a positive duty that creates a legal rule would need to be enforced and be accompanied by punishment for noncompliance. In other words, positive duties require people to be held liable for failing to confer a benefit upon

⁸⁷⁶ In fact, the “main normative ground for the rejection of positive legal duties” is that they “constitute excessive interference with individual liberty.” Murphy, “Beneficence,” 605. Liam Murphy notes that this is not necessarily a concern about liberty, but rather the serious potential material costs that are associated with positive duties; costs that impact our well-being.

someone else.⁸⁷⁷ For our purposes, only positive duties are relevant since this is how duties to rescue would be classified.

One of the most prominent, and frequently cited, critiques of the duty to rescue comes from the Chairman of the First Law Commission of India under British colonial rule: Lord Thomas B. Macaulay. In his report on the Indian Penal Code, Macaulay suggests that the key issue with codifying a duty to rescue is that of deciding where to draw the line because “there are objections to every line which can be drawn, and some line must be drawn.”⁸⁷⁸ Macaulay laments that “wherever the line of demarcation may be drawn, it will, we fear include some case which we might wish to exempt, and will exempt some which we might wish to include.”⁸⁷⁹ In particular, the question of line drawing relates to distinguishing between what constitutes a rescue versus a non-rescue situation and what are valid exemptions for a rescuer’s duty to act.

For acts that are rescue versus non-rescue, once the law intervenes to distinguish between these acts, assigning liability for nonperformance when it is a rescue and no

⁸⁷⁷ This is a rare occurrence in the American legal system, with the only reported prosecution being from *State v. La Plante*, in the Wisconsin Court of Appeals (1994), that upheld the constitutionality of a provision imposing a duty to assist crime victims. Murphy, “Beneficence,” 608fn13.

⁸⁷⁸ Thomas Babington Macaulay, “Introductory Report upon the Indian Penal Code,” in *The Complete Works of Lord Macaulay*, vol. 11 (London: Longmans Green and Co., 1906): 115.

⁸⁷⁹ Macaulay, “Code,” 111.

liability when it is not, then containing the scope of the duty becomes challenging. If one decides that the circumstances of a particular case are sufficient to create a duty to rescue, then one must also be prepared to distinguish that case from similar situations where certain elements are missing. For instance, if one distinguishes cases on the basis of the level of emergency involved, then the question arises as to when the urgency is *not* great enough to trigger a duty? The argument is that once “criminal liability for samaritan omissions” is allowed then “precise-line drawing” will be impossible.⁸⁸⁰ In the second case, the line drawing involves the person doing the rescue. Macaulay pointedly asks “what is the precise amount of trouble and inconvenience which he [the rescuer] is to endure?”⁸⁸¹ Macaulay offers the case of beggars and wonders what duty the rich owe them. If the rescuer is required to act in a case where someone faces death from drowning, then why not where death is virtually certain from starvation?

Another example he mentions is the case of a surgeon who refuses to travel from “Calcutta to Meerut,” one corner of India to another, in order to perform a surgery. He is the only person in the country who can do it and if the surgery is not performed the

⁸⁸⁰ Feinberg, “Bad Samaritan,” 65. Feinberg views Macaulay’s discussion as one that creates a division between clear cases that are not unreasonable for the rescuer, clear cases that are unreasonable for the rescuer and everything in between. *Ibid.*

⁸⁸¹ Macaulay, “Code,” 114-115.

patient will die.⁸⁸² Macaulay notes that if the surgeon has a duty to travel in this case, then we would have to require “unlimited aid to those in need” for all other cases.⁸⁸³ The legal philosopher Liam Murphy refers to the rescue duty as a “duty of beneficence” and suggests that Macaulay’s claim is that the duty would require us to continue “benefitting others until the point where further benefits will burden the donor as much as they will benefit the donee.”⁸⁸⁴ That said, Macaulay recognizes the moral and legal distinction, noting that it is “highly desirable” that people should “render active services to their neighbors,” but he thinks the law should restrict itself to negative duties.⁸⁸⁵ As for positive duties, he argues that we must “grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible” simply because it would create preposterous situations.⁸⁸⁶

Despite the reticence about positive duties, even critics acknowledge the possibility of positive duties in certain circumstances and proponents of the duties use these to center their arguments. In particular, three contexts prove to be especially

⁸⁸² Macaulay, “Code,” 110.

⁸⁸³ Arthur Ripstein, “Three Duties to Rescue: Moral, Civil and Criminal,” *Law and Philosophy* 19, no. 6 (Nov. 2000): 744.

⁸⁸⁴ Murphy, “Beneficence,” 644.

⁸⁸⁵ Macaulay, “Code,” 115. James B. Ames suggests that the “practical difficulty” of creating legislation for a duty to rescue “would be in drawing the line.” James Barr Ames, “Law and Morals,” 112.

⁸⁸⁶ Macaulay, “Code,” 115.

compelling for positive duties: where a special relationship exists with the person to be rescued, where there is an immediate need for rescue and where the rescuer is in close proximity to the one requiring rescue. In the first context, most thinkers recognize that certain relationships come with special duties attached to them, including the one between parents and their children or those between a doctor and her patients.⁸⁸⁷ Where a relationship of care has been assumed by one of the parties, positive duties will attach to them in relation to that care. Although many critics of the duty to rescue would accept this duty within a special relationship, they would likely limit which relationships are able to trigger the duty. However, this raises important questions about the scope of the duty. For instance, how close does a relationship need to be before a special duty attaches: does an aunt owe a duty to her nephew or a grandparent to a granddaughter? What about relationships outside the family, for instance between two neighbors? By extension, can shared “humanness” alone trigger a special duty? While critics of the

⁸⁸⁷ These special duties can be derived from a job, role or prior commitment. Feinberg, “Bad Samaritan,” 60. Alternatively, one might consider that they are created by “statute,” “family relation,” or “custom.” Frances H. Bohlen, “The Moral Duty to Aid Others as a Basis of Tort Liability,” *University of Pennsylvania Law Review* 56 (1908): 220. It should be noted that in recent years American “courts have increased the number of special relationships” that require one person to aid another. Weinrib, “Rescue,” 248. Even Lord Macaulay acknowledges as much in his argument against the duty to rescue, noting that while “line drawing” is an issue, there are cases where special relationships exist and people must be held accountable. For example, he cites the case of a nurse who is responsible for the well-being of a child. Macaulay, “Code,” 110.

rescue duty would never accept that human beings are in special relation to each other, it is not quite clear what their rationale is for drawing the line where they do.

The second context is when a rescue is characterized as “easy.”⁸⁸⁸ Easy rescues involve emergency situations where a rescuer, without significant sacrifice on his part, could save another human being in peril. The situation is summarized by Jeremy Bentham, the founder of modern utilitarianism, who asks, “in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself...?”⁸⁸⁹ The legal philosopher Joel Feinberg advocates for a duty in these easy rescues based on the rationale that omission here would cause severe harm and “being a fellow human being” is enough of a relationship to “ground a duty to rescue.”⁸⁹⁰ One of the issues why easy rescues require

⁸⁸⁸ Of course, there is still a criticism of an easy rescue since “the fact that a rescue would be easy to make does not create a duty where there was none before” because that would mean that a “person’s entitlement to be rescued varies with the rescue’s subjective difficulty for the rescuer.” Ripstein, “Three Duties,” 771. In fact, even Kant considered the moral duty to help in an easy rescue as “indistinguishable” from the moral duty to help the needy; neither could be a legal duty. Weinrib, “Rescue,” 267.

⁸⁸⁹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 3rd ed. (Oxford: Clarendon Press, 1823), 323. Bentham goes on to cite various examples of this such as when a woman’s head-dress catches fire and a man who has water in his hand just laughs as opposed to putting out the fire; or when a drunk man falls into a puddle and all it would take is to turn his head to the side for him not to suffocate, but another man lets him drown. Ibid. The rationale is simple: “human life is important” and “when lives can be saved without sacrificing anything of moral (or other importance) they should be.” Ripstein, “Three Duties,” 752.

⁸⁹⁰ Feinberg, “Bad Samaritan,” 60. The Law Reform Commission of Canada addressed the question of liberty in the easy rescue scenario by noting that it will be “seldom that one person will be called upon to forego his own freedom for the benefit of others” and refusal to shoulder a minor inconvenience to save

a duty relates to intentionality or the distinction between misfeasance and nonfeasance. Misfeasance involves “active misconduct working positive injury to others” while nonfeasance is “a failure to take positive steps to benefit others or to protect them from harm” you did not create.⁸⁹¹ For misfeasance, where acts are committed that intentionally cause harm, there is little debate about liability (and punishment): most agree it exists. However, a question arises as to intentionally *failing* to act: can omission be considered intentionally causing harm and should liability attach? One might argue that intentional omission is not the same as commission because in the former a rescuer must sacrifice something. However, if sacrifice is removed from the equation, as in the case of easy rescues, then an intentional harm occurs that is equivalent to commission. As one scholar observes, “if I fail to rescue a child I know to be drowning in front of me, for no reason other than that I cannot be bothered to get out of my chair, it is not at all unnatural to say that I intentionally failed to prevent the drowning.”⁸⁹²

An easy rescue usually involves both immediacy and proximity. Hence, aside from distinguishing this type of rescue on the basis of urgency, some Western scholars

a life would shock the community’s conscience. Law Reform Commission of Canada, *Omissions, Negligence and Endangering* (Ottawa: Law Reform Commission of Canada, 1985), 19.

⁸⁹¹ Bohlen, “Moral Duty,” 219.

⁸⁹² Murphy, “Beneficence,” 619. As Murphy notes, “we can ignore any duty to rescue that requires an agent to sustain expected burdens greater than the expected benefit of her act.” *Ibid.*, 649.

have also argued that proximity might intuitively create a duty. After all, shouldn't the fact that someone is near a potential rescuee trigger a duty to rescue? If it does, then how close do they need to be physically?⁸⁹³ This again raises Macaulay's problem of line drawing, but even he recognized a distinction between the doctor treating a patient in his own clinic versus four hundred miles away. Our "common-sense intuitions" seem to suggest that sometimes there is a "stronger obligation to help those in need who are physically near us than those who are at a greater distance."⁸⁹⁴

The American philosopher Frances Kamm provides two scenarios that illustrate the intuitive difference here. In the first, she describes walking past a shallow pond and seeing a child drowning in it. Saving the child will require wading into the water and ruining a \$500 suit. She suggests that intuitively, she "ought to wade in to save him." In another scenario, there is a child overseas who is starving to death. To save the child, \$500 must be sent; in this case, she says there is no intuitive obligation to help. Among other reasons, she notes that in the "pond" scenario, she may be the only one who can help, but that is likely not the case in the "overseas" scenario. Furthermore, there might

⁸⁹³ As one philosopher notes, "if it is reasonable to impose a duty to walk one step...surely it is reasonable to require two steps." Feinberg, "Bad Samaritan," 65.

⁸⁹⁴ Frances M. Kamm, "Does Distance Matter Morally to the Duty to Rescue," *Law and Philosophy* 19, no. 6 (Nov. 2000): 656.

be other children equally deserving of her help overseas, but there is only one in the pond.⁸⁹⁵ Hence, “nearness” is what determines who should be helped and would be the case even if the numbers were reversed: only one person in need of help overseas, but many drowning in a nearby pond.⁸⁹⁶ Kamm argues that a sign that we intuitively believe nearness is what obligates us is that once you are near someone who needs help, you no longer think it is permissible to move “a greater distance merely in order to avoid being near.”⁸⁹⁷ Her arguments here parallel some of the thinking that Islamic jurists have not only in the context of the duty to rescue, discussed later, but with regard to *jihād* and the manner in which the *kifāya*-duty attaches based on proximity to the conflict.

⁸⁹⁵ Kamm, “Distance,” 656-657.

⁸⁹⁶ Kamm proceeds further into a fascinating discussion on what proximity actually means. She notes that we might think it is physical distance from the “extended parts of the agent’s body to the extended parts of the victim’s body,” but it could also be the “length of time” to “traverse a physical distance.” Or additionally, it could be the proximity to tools that need to be activated to initiate the rescue. Kamm, “Distance,” 662 and 664. Peter Singer rejects the idea that the number of potential rescuers makes a difference to assessing the morality of acting to rescue; whether he is the only one or one of a million. Peter Singer, “Famine, Affluence and Morality,” *Philosophy & Public Affairs*, vol. 1, no. 3 (Spring 1972): 232. As he very poignantly asks, “Should I consider that I am less obliged to pull the drowning child out of the pond if on looking around I see other people, no further away than I am, who have also noticed the child but are doing nothing?” Singer, “Morality,” 233. He is especially cognizant of the fact that our “global village,” with “communication” and “swift transportation,” has altered the situation and “made an important, though still unrecognized, difference to our moral situation.” Singer, “Morality,” 232.

⁸⁹⁷ Kamm, “Distance,” 666. On the other hand, Peter Singer rejects this role for proximity. He argues that a person’s physical proximity to us, such that “personal contact” can be made with them, might make it “more likely that we shall assist him, but this does not show that we *ought* to help him” as opposed to someone further away. Singer, 232. He also states that even in the case of the child drowning in a shallow pond, we ought to “wade in and pull the child out” because although one’s clothes might get muddy, this is “insignificant” as compared to the death of a child. Singer, “Morality,” 231.

Western thinkers have proposed various ways in which to address the problem of codifying duties to rescue with limited encroachment on personal liberty. For instance, Liam Murphy suggests we adopt a “collective principle of beneficence,” which would require people to “sustain only that amount of sacrifice they would be required to sustain if everyone were doing their part.”⁸⁹⁸ Unlike an optimizing principle of beneficence, where those complying with the duty “take up the slack left by others,” in the collective version you are only responsible for your fair share.⁸⁹⁹ This would also account for each individual’s capacity and probability for success. In other words, from a utilitarian perspective, “the fact that a person is physically near to us, so that we have personal contact with him, may make it more likely that we shall assist him, but this does not show that we ought to help him rather than another who happens to be further away.”⁹⁰⁰ If people lack the skills needed for the rescue, meaning their chance of success is quite low, their liability under criminal law decreases as well.⁹⁰¹ Other scholars propose thinking of the duty to rescue as an obligation owed to society rather than any individual. Hence, equal distribution of benefits is not essential, similar to how public law does not

⁸⁹⁸ Murphy, “Beneficence,” 651-52.

⁸⁹⁹ Murphy, “Beneficence,” 651-52. Of course, he notes that “in some contexts, doing one’s fair share” may not be enough. *Ibid.*, 652.

⁹⁰⁰ Peter Singer, “Morality,” 232.

⁹⁰¹ Murphy, “Beneficence,” 656.

confer benefits equally on everyone. The duty to rescue is a “non-relational duty, a duty owed to society at large rather than to some particular individual” and failing to contribute means a breach of the “duty to society as a whole.”⁹⁰²

Joel Feinberg offers a similar proposal arguing that we are faced with a need to be practical, fair-minded and humane. This requires a “scheme of coordination” that allows people to be rescued while preventing “unjust enrichments of the unworthy” or “unfair disproportions in the contributions” made by some.⁹⁰³ He suggests that the “modern state’s welfare system” is precisely the solution for this: it maintains an “income floor for indigents” through taxes that it acquires from those who can pay.⁹⁰⁴ For Feinberg, this system solves the problem of the extended duty to rescue by removing the charge that the rich failed to “prevent a beggar’s death” since everyone contributes their “fair share” in taxes; in essence, he creates a “general duty” to “support welfare with taxes.”⁹⁰⁵ These are distinct from what Feinberg considers “random and

⁹⁰² Ripstein, “Three Duties,” 775.

⁹⁰³ Feinberg, “Bad Samaritan,” 66.

⁹⁰⁴ Feinberg, “Bad Samaritan,” 66. These funds can then be used by the state to create institutions that specialize in rescuing individuals, such as local firefighters. Feinberg notes that: “the reason we have the duty to report the fire but not the duty to fight it is not just that there is minimal effort required in the one case and not in the other. It is rather that the very strict social duty of putting out fires is most effectively and equitably discharged if it is split up in advance through the sharing of burdens and the assigning of special tasks.” Ibid., 67.

⁹⁰⁵ Feinberg, “Bad Samaritan,” 66.

unpredictable emergencies of life that require time and effort,” in other words like the easy rescue.⁹⁰⁶ In these cases, “imminent peril cannot wait for assistance from the appropriate social institutions” and, as a result, he argues that the “chance rescuer” is unfairly burdened.⁹⁰⁷ Hence, Feinberg advocates statutes that require performance of easy rescues, while the state system handles all other types of “rescue.” The rationale is simple: an individual duty cannot be determined in isolation without taking into account the “nature and scope” of duties that are assigned to everyone else.⁹⁰⁸ The only exception to this are those situations that “cannot be discharged by institutional mechanisms and special assignments” because they are so sudden and a bystander can either make a rescue or alert others without risk.⁹⁰⁹ We see a similar rationale play out in Islamic law, specifically in the context of foundlings.

Bearing the above in mind, as a practical matter, in modern legal systems the resistance to positive legal obligations has been more pronounced in common law countries, largely due to their opposition to criminalizing omissions while civil law

⁹⁰⁶ Feinberg, “Bad Samaritan,” 66.

⁹⁰⁷ Feinberg, “Bad Samaritan,” 66.

⁹⁰⁸ Feinberg, “Bad Samaritan,” 67.

⁹⁰⁹ Feinberg, “Bad Samaritan,” 68.

countries tend to recognize a general duty to rescue.⁹¹⁰ In the context of drowning, the most commonly cited case from the United States is *Osterlind v. Hill* from the Supreme Judicial Court of Massachusetts in 1928, where two drunk individuals were drowning, cried out for help, but were ignored by an individual fully capable of saving them. The Court ruled that the failure to respond was immaterial because there is “no legal right” that was “infringed.”⁹¹¹ Among European nations, Portugal was the first to enact a duty to rescue statute in the mid-19th century and over the next hundred years fifteen other European nations joined them.⁹¹² Interestingly, the different cantons in Switzerland are

⁹¹⁰ Edward A. Tomlinson, “The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement,” *New York Law School Journal of International and Comparative Law* 20 (2000): 451-452. Hence, the opposition to a duty to rescue seems to be most pronounced in “English-speaking” countries as opposed to continental Europe and Latin America. Murphy, “Beneficence,” 605. In fact, these countries have left these failures to rescue unpunished even when the omissions are of an “immoral kind.” Feinberg, “Bad Samaritan,” 57.

⁹¹¹ *Osterlind v. Hill*, 160 N.E. 301 (Mass. 1928). In fact, Hill apparently sat smoking with the boat and a rope close at hand, actively choosing to do nothing. Murphy, “Beneficence,” 622. This case alludes to the rule that, in most cases, there is no criminal liability for omission. Another U.S. case illustrating this rule is *People v. Beardsley* where a man failed to come to the aid of his intoxicated mistress, whom he left in the basement of his house. He was initially convicted of manslaughter, but on appeal the Michigan Supreme Court ruled that no legal duty existed. *People v. Beardsley*, 150 Mich. 206 (1907). That said, there are states where duty-to-aid provision are in force, such as Rhode Island, Minnesota and Vermont. Murphy, “Beneficence,” 611fn23. In addition to the states cited, Hawaii, Massachusetts, Washington and Wisconsin have duties to aid crime victims or report an ongoing crime. Florida and Nevada have duties to report certain sexual offenses. *Ibid*.

⁹¹² Feinberg, “Bad Samaritan,” 57. This includes the penal codes of Belgium, France, Germany, Greece, Italy and Poland. Law Reform Commission of Canada, *Omissions, Negligence and Endangering* (Ottawa: Law Reform Commission of Canada, 1985), 17. The Netherlands, Norway, Denmark, Poland and a few other countries restrict the duty to “situations involving sudden and imminent danger to human life.” Aleksander W. Rudinski, “The Duty to Rescue: A Comparative Analysis,” in *The Good Samaritan and the Law*, ed. James M. Ratcliffe (New York: Doubleday & Company, Inc., 1966): 91. In fact, Norway, Germany and

particularly useful in that they reflect the range of rescue duties that this chapter argues qualify as duties to rescue in Islamic law. For instance, several cantons in Switzerland have general provisions “concerning persons in immediate danger” that need to be rescued, while other cantons “restrict the duty to abandoned children and old or sick people” and a few preserve the “medieval obligation” to take an “active part in saving life and property during general disasters.”⁹¹³

Moral and Legal Duties in Islamic Law

The preceding discussion provides a broad theoretical framework within which to examine the ideas Islamic legal thinkers presented on duties to rescue. Through this framework some of the broader implications of the discourse on *kifāya*-duties to rescue will come to light, as well as the potential significance of points where Islamic thought diverges or converges with the framework. For instance, when considering the duty

Denmark require that the danger to life be “obvious” or “evident.” Rudinski, “Comparative,” 102. France’s law is arguably the most harsh and criminalizes a failure to rescue with sanction of up to five years in prison and a significant fine. Murphy, “Beneficence,” 610. The French first enacted a criminal statute concerning duties to rescue in 1941 and French scholars have argued that at the very least the statute has created a vocabulary and mentality among French citizens that it is an offense not to render aid to people in peril. Tomlinson, “French Duty,” 453. French courts have gone so far as to convict physicians who fail to visit a sick person that is in danger of death. In one case, a hospital director was convicted for failing to aid when he refused a patient admission despite a physician indicating that the patient was in a “dangerous condition.” Rudinski, “Comparative,” 102.

⁹¹³ Rudinski, “Comparative,” 92.

owed to someone in need of rescue, whether urgent or not, it can be argued that modern Western and premodern Islamic legal philosophers diverged in their thinking on the role of morality and the state in the law. For Western philosophers an essential question surrounding legal duties is the extent to which they can or should be enforced. For them, a failure to consider the state's coercive power to punish the duty to rescue means that it is a largely empty theoretical question with simple answers. They are generally in agreement that it is a moral duty, but disagree as to whether the law should punish someone for not performing it.

Premodern Islamic jurists do not view state action for these duties as essential in any sense. While there is the obvious fact that the modern administrative state was something alien to premodern jurists, their crafting of legal rules for rescue did not rely on the coercive power of any political entity. In some sense, one might argue that coercion is hardwired into Islamic law for other reasons: it is a legal regime where divine, as opposed to state, accountability is an underlying premise. For the same reason, Islamic jurists also generally do not recognize a division between law and morality. While natural law theorists and legal positivists in the Western tradition allow morality to *influence* law, Islamic jurists might argue that morality *informs* the law. In other words, moral duties will always be legal duties as well.

This chapter examines the duty to rescue in the Islamic context in light of these broader questions above. The primary aim is to use this subset of *kifāya*-duties to demonstrate how the legal discourse and juristic thinking on *kifāya*-duties evolved in later centuries. The chapter proposes to answer questions on a variety of matters including the possible functions of these duties in society and for jurisprudence, as well as the problems they create for theoretical consistency and their impact on the boundaries of the moral community. The chapter focuses its main attention on two duties: the duty to perform an easy rescue and the duty to rescue foundlings (*iltiqāt*).

Easy Rescues in Islamic Law

When discussing the duty to rescue, secondary literature on Islamic law generally restricts itself to examining the discourse on “enjoining right” and “forbidding wrong.” Most prominently, Michael Cook credits his knowledge of “Muslim views on rescue” to what he has been able to derive from “material incorporated into accounts of forbidding wrong.”⁹¹⁴ He suggests that while conceptually the duty to rescue and “forbidding wrong” might be distinct, they “overlap in a sufficiently intimate way to make them

⁹¹⁴ Cook, *Commanding Right*, 588.

broadly comparable.”⁹¹⁵ This view is not without merit, but it fails to take sufficient account of the prominent role the duty to rescue has within *kifāya*-duties as a whole.⁹¹⁶ As mentioned above, the duty to rescue is routinely used as a model for illustrating the prototypical scenario where a *kifāya*-duty is triggered. In its simplest form, the duty is “an obligation to come to the aid of people in trouble.”⁹¹⁷

More specifically, the duty to rescue under consideration is what Western thinkers would classify as an “easy rescue,” involving distinguishing specific elements relating to urgency and proximity. The vast majority of discussions use one scenario of an easy rescue: the drowning person (*inqādh al-gharīq*). The standard account describes a scenario where individuals on the shores of a river observe someone drowning and contemplates the obligation owed to the drowner. Jurists argue that it is not sufficient for bystanders to remain onlookers: their proximity to the imminent emergency situation triggers a duty for each of them. Similar to Frances Kamm, premodern Islamic jurists seem to rely on common sense intuition to establish liability for performance based on physical proximity to the rescue. In addition, where more than one potential

⁹¹⁵ Cook, *Commanding Right*, 590.

⁹¹⁶ The “forbidding wrong” context is not the only one in which the duty to rescue plays a complementary role. For instance, both Māwardī and Ibn Qudāma mention its function in the discussion on foundlings. Māwardī, *al-Ḥāwī al-kabīr*, vol. 18, 34; Ibn Qudāma, *al-Kāfī*, vol. 3, 465.

⁹¹⁷ Cook, *Commanding Right*, 587.

rescuer is present, jurists require performance based on proximity, but allow it to be done collectively. At least one potential rescuer must attempt to save the drowning person and, in the process, absorbs responsibility from everyone else. Simply attempting a rescue is sufficient to fulfill the duty, regardless of whether it results in success. If no one attempts to rescue the drowning person, then every onlooker is considered equally liable.

However, jurists operate with two fundamental assumptions. First, the standard prerequisites for legal liability to attach (i.e. maturity, sanity, etc.) must exist for easy rescues as well.⁹¹⁸ Thus, regardless of proximity, if the potential rescuer is a child or lacks mental capacity, no duty attaches. This is further proof of the jurists not distinguishing between moral and legal duties; in the absence of legal capacity, nonperformance of a duty is both moral and legal. Second, some duties require special skills for performance. However, certain duties require performance despite the absence of the necessary skills. For instance, in order to save a drowning person, the individual attempting to perform the easy rescue should ideally know how to swim, but Qarāfī says that performance of the duty cannot be delayed even if they lack this ability (*lā yatrūk inqādh al-gharīq man la*

⁹¹⁸ Qarāfī, *Dhakhīra*, vol. 10, 24; See also, Nawawī, *Rawḍat al-ṭālibīn*, vol. 4, 485.

yaʿūm).⁹¹⁹ This is indicative of a simpler principle underlying certain *kifāya*-duties: they obligate performance even in the absence of the requisite capability to perform. This point seems to address a key question in duties to rescue: what level of sacrifice is necessary from the potential rescuer? Qarāfi seems to suggest that despite the decreased probability of a successful rescue, one cannot abandon an easy rescue. This contrasts with the utilitarian perspective mentioned earlier, which decreases liability based on whether the skills necessary for a successful rescue are present. Essentially, Qarāfi is suggesting that even an improbable rescue will not negate an easy rescue.

Jurists also utilize the easy rescue scenario to highlight different aspects of the *kifāya*-doctrine. Qarāfi uses easy rescues to emphasize broad principles underlying *kifāya*-duties. For instance, he notes that the duty to rescue here illustrates how “divine reward” for performing a *kifāya*-duty cannot always be replicated by repeat performance. In the case of a drowning person, once that individual has been rescued, the duty is suspended. Anyone who subsequently jumps into the river intending to perform a rescue will not be eligible to receive a reward: the act no longer has value.⁹²⁰ He notes that if you “descend

⁹¹⁹ Qarāfi, *Dhakhira*, vol. 10, 24.

⁹²⁰ The only exception discussed in the literature is where the subsequent rescuer has no knowledge of the fact that the drowning person has been saved. The absence of knowledge suggests that the attempted rescue was genuine and since only an “attempt” is required to be eligible for commendation, this rescue will be treated the same as the actual one.

[into the water] after the rescue has happened, no benefit is gained.”⁹²¹ In other words, the initial performance of the obligation satisfies the requirement completely.⁹²² Qarāfi explains his logic as follows: if Zayd is drowning and someone saves him, then there is no “reason” to rescue him because Zayd is no longer drowning and the duty to rescue no longer exists.⁹²³

The duty to perform an easy rescue also appears in discussions tangential to the *kifāya*-duty, specifically when exploring whether it is possible to know good and evil outside of religion and the relationship between rights owed to humans and those owed to God. With regard to good and evil, the question revolves around whether human beings should be expected to recognize the “goodness” (*ḥusn*) inherent in saving a life without the aid of religion.⁹²⁴ Zarkashī mentions that some jurists argued religion was not necessary for determining whether to save someone from drowning or starvation.⁹²⁵

⁹²¹ Qarafi, *Dhakhīra*, vol. 10, 23.

⁹²² Qarafi, *Dhakhīra*, vol. 1, 83.

⁹²³ Qarafi, *Furūq*, vol. 1, 212. There is some additional discussion in the literature as to whether cessation of the duty occurs due to the *completion of performance* or the *absence of a reason to perform*.

⁹²⁴ The question of how to determine what is good and evil is a prominent theme in Islamic theology. For the Ash‘arites, the meaning of good is “an act whose agent is commended in the Law” and the meaning of evil is “an act whose agent is reproached in the Law.” Vasalou, *Mu‘tazilite Ethics*, 7. On the other hand, Mu‘tazilites believed that “moral values are generated by objective features of acts that are accessible to human reason.” Vasalou, *Mu‘tazilite Ethics*, 15.

⁹²⁵ Zarkashī, *Baḥr al-Muḥīṭ*, vol. 1, p. 153. He uses the term “starvation,” but presumably means starvation that will lead to imminent death and not starvation in general, which would account for neither imminence nor proximity, thus be too dissimilar to drowning.

For example, Fakhr al-Dīn al-Rāzī concludes that religion is not a prerequisite for determining every evil (*qubḥ*). He crafts his argument by considering the ruling that “telling a lie” is a deplorable act (*qabḥ al-kadhib*) because “in its essence it is *against* what is beneficial to society.”⁹²⁶ The logical corollary, he argues, is that the “goodness of telling the truth” is apparent because in its “essence it *must* align with what is beneficial to the world.”⁹²⁷ In this context, Rāzī then mentions the inherent “goodness of rescuing a drowning person” (*ḥusn inqādh al-gharīq*), or even of attempting a rescue, “because it encompasses what we consider good character” (*li-annahū yataḍamman ḥusn al-dhikr*).⁹²⁸

Furthermore, even if good character is not found in a person, the inherent goodness of rescuing someone is in every human being because “whoever sees someone from their own species in pain, their heart feels pain” (*man shahida shakhṣan min abnāʾi jinsihi fī al-alam taʿallama qalbuḥu*).⁹²⁹ Hence, Rāzī considers the rescue necessary to “prevent [the rescuer from] feeling pain in the heart” (*dafaʿa al-alam ʿan al-qalb*), and this is why he inclines towards this path; presumably, to both avoid the pain of watching

⁹²⁶ Rāzī, *Maḥṣūl*, vol. 1, 131.

⁹²⁷ Rāzī, *Maḥṣūl*, vol. 1, 131. The Muʿtazilites provided another explanation for why lying is evil: in order to “trust in revealed truth” you had to be certain that “God would not lie” under any circumstances. This is also why they said the evil of lying must be prior to revelation. Vasalou, *Muʿtazilite Ethics*, 28.

⁹²⁸ Rāzī, *Maḥṣūl*, vol. 1, 131.

⁹²⁹ Rāzī, *Maḥṣūl*, vol. 1, 131.

another person suffer and failing to do anything about it.⁹³⁰ For him, the desire to avoid this pain, including guilt of nonperformance, is what motivates him to step forward to perform the rescue. Since this pain and guilt are independent of religion, Rāzī concludes that rescuing someone is inherently good and the duty to rescue exists even when religion is absent.⁹³¹ This argument by Rāzī presents a unique take on the ethical question of self-sacrifice. Ordinarily, the assumption is that any steps the potential rescuer takes to perform a duty to rescue will risk harm to himself. Rāzī, on the other hand, proposes something counterintuitive; he argues that a *failure* to perform the duty is what leads to harm because it negatively impacts the psyche of any potential rescuer.

Jurists also use the duty to rescue as a means to discuss the relationship between duties owed to human beings and those owed to God. Āmidī discusses whether the rights of human beings should receive precedence over the rights of God and seems to suggest that at times “human” rights are more important.⁹³² In fact, he notes that what is “beneficial to the person” (*maṣlaḥat al-naḥs*) should be given precedence over what is “beneficial to religion” (*maṣlaḥat al-dīn*).⁹³³ Āmidī arrives at this conclusion because of the

⁹³⁰ Rāzī, *Maḥṣūl*, vol. 1, 131.

⁹³¹ Rāzī, *Maḥṣūl*, vol. 1, 131.

⁹³² Āmidī, *Iḥkām*, vol. 4, 338-339.

⁹³³ Āmidī, *Iḥkām*, vol. 4, 338-339.

leniency that he sees built into the performance of religious acts. For instance, the performance burden of various acts of worship can be decreased in order to accommodate different circumstances. This is generally done through suspending, delaying or modifying an act of worship. For example, when someone is traveling, they are permitted to decrease the length of certain prayers and are allowed to postpone obligatory Ramadan fasts that fall within days of travel. Similarly, a sick person may modify their prayer by performing it without observing otherwise required details of the prayer ritual. They may perform the entire prayer while seated, bypassing the portions that require standing or prostration. For Āmidī these are all reasons why what is beneficial to the person receives precedence over individualized (‘*ayn*) religious obligations. Hence, in the context of rescuing a drowning person, Āmidī says that prayer should be suspended, despite its benefits, in order to secure the greater benefit of saving a life (*qaddamnā maṣlaḥat al-naḥs ‘alā maṣlaḥat al-ṣalāh fī ṣūrat injā’ al-gharīq*).⁹³⁴ Affirming this last point, Ibn Muflīḥ, in his book *al-Furūʿ*, mentions the legal opinion of Ibn al-Zāghūnī (d. 1132), a teacher of Ibn al-Jawzī, on fasting, stating that “whoever finds an innocent person in danger, like someone drowning or in a similar predicament” they

⁹³⁴ Āmidī, *Iḥkām*, vol. 4, 338-339. He goes on to note that this is not really an instance of giving preference, but simply postponing the prayer to a later point. Ibid., 340.

must save them even if it requires breaking their fast.⁹³⁵

Like prayer, fasting is considered a primary religious obligation and this exception seems to acknowledge that a singular obligatory act is not equivalent to acts that may secure someone's well-being. Qarāfi frames his views slightly differently but arrives at the same conclusion. He focuses on *when* the obligation must be performed and within this reflects the distinction between a singular act fulfilling a core obligation and a general act in preservation of life. In other words, Qarāfi centers his distinction on the question of immediacy. Specifically, he notes that the duty to rescue is a type of obligation that involves special circumstances requiring delayed performance of other core duties in order to focus on preserving someone's life. This is contrary to ordinary circumstances where immediate performance of core duties is preferable over anything else.⁹³⁶ He explicitly states that "preservation of life and limb...takes precedence over obligations of worship (*ibādāt*), thus the duty to save a drowning person or someone burning in a fire, or something similar, takes precedence even over prayer."⁹³⁷ Clearly

⁹³⁵ His full name is 'Alī b. 'Ubayd Allāh. Ibn al-Muflīh, *Kitāb al-Furū'*, vol. 4, 448. He considers this situation to fall within the "category of *al-diyāt*" and goes on to discuss whether there is *kaffara* associated with breaking one's fast here.

⁹³⁶ Qarāfi, *Anwār al-burūq fī anwā' al-furūq*, includes the book *Idrār al-shurūq 'alā anwā' al-furūq* by Qāsim b. 'Abd Allāh ibn al-Shāṭir, edited by n.a., vol. 2 (Beirut: Dār al-Kutub al-'Ilmiyya, 1998), 331-333.

⁹³⁷ Qarāfi, *Furūq*, vol. 2, 332. Interestingly, Qarāfi seems to add a condition to the rescue duty which allows it to supersede worship obligations: the duty must be designated to a specific person such that only they

when he speaks of preserving life and limb he is referring to easy rescues and not the broader notion of rescue absent the requirement of immediacy. The two examples Qarāfi uses, drowning and burning in a fire, confirm the easy rescue context.

Returning again to the question of how much self-sacrifice is required of the potential rescuer, Islamic jurists look beyond risk to one's life and advocate the delay of other personally beneficial required duties for the sake of performing easy rescues. In other words, they must perform something of benefit to someone else, while doing "harm" to themselves by forgoing acts of personal benefit. This can be best understood if considered within the larger Islamic eschatological framework. While theological schools differ on the precise details of Islamic eschatology, at the most basic level there is an understanding that some combination of an individual's deeds and beliefs will be assessed after his death to determine whether they are worthy of reward or punishment. Among their deeds will be the duties they were required to perform, most prominent of which are those they are personally responsible for: the *ʿayn* obligations. Since these are required duties, failure to perform will count against the individual in his final accounting. This would put them worse off than prior to the rescue, suggesting that the

can perform. Ibid. Elsewhere, he also states that saving a human life takes preference over saving an animal. Ibid., 234.

rescue itself must confer enough of a benefit to outweigh the harm of not performing other individually required duties. The idea that rescue itself provides a benefit to the rescuer complicates any analysis of self-sacrifice especially in comparison to Western thinkers, who do not generally account for “divine reward” in their cost/benefit assessment. In essence then, the question of self-sacrifice may not even exist for Islamic jurists since they conceive of the reward for saving a life as extending beyond earthly existence.

Bearing the above in mind, the duty to rescue is important for a number of reasons. First, it aptly demonstrates how jurists conceive of *kifāya*-duties as having a more universal application to humanity. Second, since there is no explicit textual support for the duty, jurists routinely employ deductive reasoning as proof of why the duty to rescue exists and why, at times, it should receive preference over other duties. This is especially instructive in cases where jurists deduce that the rescue-duty must be pursued over an *ʿayn*-obligation. Finally, attempted performance of a duty is considered equivalent to its successful performance. This highlights the fact that jurists are not necessarily as concerned with outcomes as they are with cultivating a certain hierarchy of values.

Duty to Rescue Foundlings (*iltiqāt*)

Although the duty to perform an easy rescue is helpful for framing, the *kifāya* duty in the realm of rescue that contains the most detailed discussion is the duty owed to foundlings (*laqīṭ*).⁹³⁸ In many respects, the foundling-duty represents a midpoint between an easy rescue and a more expansive notion of rescue. This is primarily because, while the foundling-duty lacks the same immediacy as drowning, the involvement of a vulnerable child creates a heightened degree of urgency. Substantively, the foundling-duty is premised on a broader obligation to preserve anything that might be diminished or even perish without proper care. Specifically, Shāfiʿī reportedly stated that “taking custody of everything exposed to waste, when no one else can secure it, is a collective duty (*farḍ kifāya*).”⁹³⁹ Hence, it is not surprising that the foundling-duty, as well as other *kifāya* acts, are frequently justified through reference to general principles requiring the

⁹³⁸ Sometimes also referred to as *manbudh*. There does not seem to be a clear distinction between the two terms and they are often used interchangeably.

⁹³⁹ Ibn Rushd, *Bidāyat*, vol. 2, 374. Interestingly, Shāfiʿī does not seem to extend collective duty to the foundling context. He makes no mention of caring for foundlings being a *kifāya*-duty in the brief section on foundlings in *al-Umm*. See, Shāfiʿī, *al-Umm*, vol. 4, 73-74. Furthermore, he also makes no mention of foundlings when listing examples of *kifāya*-duties. However, there could be various explanations for why foundlings are not mentioned with the other *kifāya*-duties. For instance, Shāfiʿī may be emphasizing certain duties as the primary *kifāya*-duties while others, like the foundling duty, are more marginal. At the same time, he may simply list some *kifāya*-duties together to illustrate what they are, but with no intention of creating a comprehensive list. The lists simply may not be exhaustive of all the acts he considered under the category of *kifāya*.

preservation of life and property. On the other hand, some jurists propose that the foundling-duty should not be considered an obligation at all. They argue that performance of this act of rescue was actually just “recommended” (*mandūb*) and rises to the level of a collective duty only when the child is “exposed to danger.”⁹⁴⁰ Put another way, the argument seems to be that only when the scenario involves an imminent loss of life, what we might classify as an “easy rescue,” is the urgency sufficient to warrant the creation of a duty to rescue the foundling. According to one scholar, different views on how to classify taking custody of a foundling are the result of “jurists’ own independent reasoning (*ijtihād*),” since there are no statements regarding the foundling-duty in either the ḥadīth literature or the Qurʾān.⁹⁴¹

Generally speaking, a foundling is a “human child whose parentage and whose status (free or slave) is unknown.”⁹⁴² In the literature on positive law, foundlings, as well as the duties associated with them, are often discussed immediately following sections on rules for handling intentionally abandoned property (*luqṭa*). Even superficially, the link between abandoned property (*luqṭa*) and foundlings (*laqīṭ*) is evident from their

⁹⁴⁰ M.S. Sujimon, “The Treatment of the Foundling (Al-Laḳīṭ) According to the Ḥanafīs,” *Islamic Law & Society*, vol. 9, no. 3 (2002). 360.

⁹⁴¹ Sujimon, “Foundling,” 360.

⁹⁴² A.M. Delcambre, “Lakīṭ,” in *Encyclopedia of Islam*, 2nd ed., ed. C.E. Bosworth, et. al. (Leiden: E.J. Brill, 1982): 639; See, Shāfiʿī, *al-Umm*, vol. 4, 73.

shared linguistic root (*l-q-t*). Where a subject is discussed in a particular legal text is indicative of the jurist's approach to the topic and the types of inquiries they will make. Here, it is fair to conclude they consider foundlings an extension of property law, suggesting that the questions on abandoned children should relate to those on abandoned property. The questions jurists pose regarding abandoned property are easily applied to foundlings. For instance, jurists ask whether an individual is permitted to take possession of abandoned property or must avoid doing so? In cases where possession is taken, is there any obligation on the property finder (*multaqit*) to search for the actual owner? Furthermore, how should this abandoned property be used? Can a finder utilize the property before securing ownership rights over it? Jurists apply each of these questions to the foundling context as well, considering abandoned children as analogous to abandoned property. As a result, one of the central questions jurists sought to answer was whether a foundling can be treated like a slave or if they should be considered a free person, an issue that again takes jurists into the implications of ethical considerations underlying a duty to rescue.⁹⁴³

⁹⁴³ The question of whether the foundling is free or not is usually connected to whether anyone has patronage (*walāʾ*) over him and, if so, who is entitled to be the foundling's patron. The determination often comes with associated responsibilities including financially supporting the child, etc. Ulrike Mitter, "Origin and Development of the Islamic Patronate," in *Patronate and Patronage in Early and Classical Islam*, eds. Monique Bernards & John Nawas (Leiden: Brill, 2005), 94.

Definitions and Classifications

Most jurists define a foundling (*laqīṭ*) as a “young, abandoned child” who is subsequently found.⁹⁴⁴ In addition to the linguistic meaning, Kāsānī says the term has a customary meaning as the name given to a “lost child” (*al-ṭifl al-mafqūd*).⁹⁴⁵ Ghazālī has a definition similar to most other jurists, but includes the requirement that the lost child must have “no guardian.”⁹⁴⁶ Nawawī also includes the absence of guardianship as part of his definition.⁹⁴⁷ He notes that there are a few different words for a “lost and abandoned child” (*al-ṣabī al-mulqā al-ḍāʿi*): *laqīṭ*, *malqūṭ* or *manbūdh*.⁹⁴⁸ Jurists also offer opinions on the exact age for a foundling to be considered a lost *child* as opposed to an adult. For instance, Ibn Rushd notes that in terms of age, a *laqīṭ* is a “minor child, who has not attained puberty.”⁹⁴⁹ Nawawī excludes from the definition any child who has attained puberty (*bāligh*), arguing that they are not in need of assistance in their upbringing.⁹⁵⁰

⁹⁴⁴ Ibn Ḥazm, *al-Muḥallā*, vol. 8, ed. M. Munīr al-Dimashqī (Cairo: Idārat al-Ṭabāʿat al-Munīrat, 1928-34), 274; Ibn Qudāma, *al-Kāfi*, vol. 3, 465; Ghazali, *al-Wasīṭ*, vol. 4, 303 & 306; Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 484.

⁹⁴⁵ Kāsānī, *Badāʿi al-ṣanāʿi*, vol. 6, 197.

⁹⁴⁶ Ghazali, *al-Wasīṭ*, vol. 4, 303 & 306. This was Shāfiʿī's opinion as well, though he presumes a t of who qualifies as a foundling. See, Shāfiʿī, *al-Umm*, vol. 4, 73.

⁹⁴⁷ Nawawī, *Rawḍat*, vol. 4, 484.

⁹⁴⁸ Nawawī, *Rawḍat*, vol. 4, 483.

⁹⁴⁹ Ibn Rushd, *Bidāyat*, vol. 2, 372.

⁹⁵⁰ Nawawī, *Rawḍat*, vol. 4, 484.

The issue of how a child actually becomes abandoned is not discussed by most jurists. The one exception is Māwardī who begins his discussion on foundlings by mentioning three scenarios leading to a child’s abandonment. First, is the case of a child whose parent passes away and it has no other guardian. Second, is a child whose mother concludes that she is too weak to care for the child (*taḍʿaf ʿan al-qiyām bihi*) and so abandons him.⁹⁵¹ And finally, he mentions the child who is conceived out of an illicit sexual relationship (*fāḥisha*) and subsequently abandoned by his mother, who fears being dishonored.⁹⁵²

To fully appreciate the discussion on foundlings, it is important to expand on the underlying definitions and framework, namely “abandoned property,” or *luqṭa*. Ibn Rushd notes that broadly speaking *luqṭa* is the “property of any Muslim that is exposed to loss” regardless of whether it is lost in an inhabited area or a “desolate area.”⁹⁵³ He cites three types of found property, based on Anas b. Mālik’s categorization, as understood by his followers. The first type of property is the kind that would be

⁹⁵¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 8, 34.

⁹⁵² Māwardī, *al-Ḥāwī al-kabīr*, vol. 8, 34. Interestingly, each scenario Māwardī highlights presumes the absence of the father and places the onus for abandonment on the mother. This discussion of causation does arise with other jurists as well. Many Ḥanafis, for instance, “define a foundling as a living child who has been abandoned by its parents out of fear of destitution or to avoid an accusation of fornication.” See, Sujimon, “Foundling,” 358.

⁹⁵³ Ibn Rushd, *Bidāyat*, vol. 2, 369.

squandered if left unclaimed. The second, is a type of property that is not yet in someone's possession, but may be destroyed if it isn't secured. The final type of property is the kind where there is no fear of it being lost.⁹⁵⁴ Jurists create analogs to these types of properties when discussing foundlings.

Free or Slave?

As mentioned earlier, one of the most important questions that arises in this context is what status to give foundlings since their origins are unknown.⁹⁵⁵ Essentially, how far should the analogy to property extend? Should a foundling be considered “free” for legal purposes or can they be classified as a slave? This determination is important since it alters the nature of the finder's guardianship. If the child can be considered a slave then the finder can assert ownership rights, which allow him to derive economic benefit from the child. The child's status is also crucial in determining whether property law applies (since slaves were property) or another set of legal rules. In addition to these

⁹⁵⁴ Ibn Rushd, *Bidāyat*, vol. 2, 372.

⁹⁵⁵ This is not a discussion unique to Islam, but present within the larger discourse around slavery. In Roman civil law, later adopted into British and American law, the concept of *partus sequitur ventrem* (“that which is brought forth follows the womb”) dictated the child's status. This only applied to cases *extra matrimonium*, but if the child was conceived *in matrimonio* then “its condition dates from its conception.” George Leapingwell, *A Manual of the Roman Civil Law: Arranged After the Analysis of Dr. Hallifax* (Cambridge: Deighton, Bell and Co., 1859), 39.

practical considerations, the determination of a child's status also carried obvious ethical implications about how unknown human beings should be classified. Simply put, taking custody of any foundling means incurring a potentially significant cost, which a "slave" foundling could recompense through forced servitude, but not a "free" foundling.

In general, jurists respond to this question by following the presumption (*aṣl*) held by Shāfi'ī that foundlings are "free by default" because freedom is the original state of human beings.⁹⁵⁶ Ibn Qudāma classifies foundlings as free based on a narration from 'Umar where Sunayn Abū Jamīla said: "I found a foundling, so I brought him to 'Umar who said: "Go away, he is free and upon you is his guardianship and for us are his financial expenses."⁹⁵⁷ Kāsānī also says it is vital to know whether the child is free or a slave and what his lineage is. He suggests that the child is free by default and subject to laws specific to free people until evidence to the contrary appears.⁹⁵⁸ Shīrazī takes it one step further, requiring no investigation into the child's status and simply presuming that he is free when he is found.⁹⁵⁹ Ibn Ḥazm expands on the notion that the original state of

⁹⁵⁶ Shāfi'ī, *al-Umm*, vol. 4, 73. See also, Muzanī, *Mukhtaṣar*, 185. In fact, this opinion was adopted by the majority of other jurists as well. See, Burhān al-Dīn al-Marghīnānī, *al-Hidāya sharḥ badāya al-mubtadī*, vol. 4, ed. Na'īm Ashraf Nūr Aḥmad (Karachi: Idārat al-Qurān wa-'ulūm al-Islamiyya, 1996), 362; Ibn Qudāma, *al-Kāfi*, vol. 3, 465; Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 6, 197; Sujimon, "Foundling," 361 ("the majority of Muslim scholars...declare that man is born free.").

⁹⁵⁷ Ibn Qudāma, *al-Kāfi*, vol. 3, 465.

⁹⁵⁸ Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 6, 198.

⁹⁵⁹ Shīrazī, *al-Muhadhdhab* vol. 2, 312.

human beings is freedom, noting that the reason a foundling (*laqīṭ*) is free, without any other authority over them, is because everyone is a child of Adam and Eve, the “original” humans.⁹⁶⁰ Both Adam and Eve were free and legally children of free people acquire their parents’ status without exception. The only possible exception, Ibn Ḥazm concedes, might arise out of a specific text from the Qur’an or Sunna rejecting the default “free” state, but he contends no such text exists regarding foundlings.⁹⁶¹ An outlier opinion was held by jurists like Abū al-Ḥusayn al-Qudūrī (d. 428/1037), who permitted a finder to hire out the services of the foundling.⁹⁶² Burhān al-Dīn Marghīnānī (d. 593/1197) rejects this opinion and argues that the only circumstance in which a child may be put to work in this manner is as an apprentice with the express purpose of helping the child develop the ability to “stand on his own two feet.”⁹⁶³

Conditions for the Finder

Jurists also consider the qualities necessary in the person who discovers the child, the “finder” (*multaqīṭ*), and acquires the duty to rescue. The pre-modern literature

⁹⁶⁰ Ibn Ḥazm, *Muḥallā*, vol. 8, 274; see also, Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 6, 197.

⁹⁶¹ Ibn Ḥazm, *Muḥallā*, vol. 8, 274.

⁹⁶² Qudūrī, *Mukhtaṣar*, 134.

⁹⁶³ Marghīnānī, *al-Hidāya*, vol. 4, 366. The basic idea is that the finder does not have the authority to “destroy his (foundling’s) benefits,” thus functioning more as an “uncle” than a “mother.” Ibid.

includes some debate over who precisely carries the burden of guardianship over the child. Some argue that guardianship belongs to the finder while others suggest it resides with the community collectively.⁹⁶⁴ In cases where the finder is judicially granted guardianship, jurists are primarily interested in certain criteria being met, which are necessary for custodianship over property in general. Hence, as a bare minimum the finder must be “free,” not a slave, “trustworthy” and “sane.”⁹⁶⁵ Muzanī also mentions the requirement that a finder be trustworthy (*thiqa*).⁹⁶⁶ If the finder is discovered to be untrustworthy then Muzanī places the child in the care of the state, a point we will return to later. In a similar vein, Nawawī also raises the issue of impartiality (*‘adāla*) in the context of a discussion on the elements of Islamic custodianship (*arkān al-iltiqāṭ al-shar‘ī*). Like Ghazālī, Nawawī requires that the finder certify his uprightness through testimony (under oath) prior to assuming responsibility for the child.⁹⁶⁷

It should be noted that jurists did not necessarily conceive of these qualities as absolute pre-requisites, but preferences in cases where more than one finder existed. For instance, Shāfi‘ī reportedly preferred that a finder be a free person, but does not preclude

⁹⁶⁴ Ibn Rushd, *Bidāyat*, vol. 2, 374.

⁹⁶⁵ Ibn Rushd, *Bidāyat*, vol. 2, 374; Marghīnānī, *al-Hidāya*, vol. 4, 364-65; Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 485.

⁹⁶⁶ Muzanī, *Mukhtaṣar*, 185.

⁹⁶⁷ Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 484.

a slave from ever acquiring guardianship over a foundling.⁹⁶⁸ Similarly, he also preferred that finders be town dwellers, living a “settled” life, as opposed to nomads.⁹⁶⁹ Other jurists tend to prefer the finder be a free person, but explicitly allow a slave, or a slave in the process of manumission, to take custody of a foundling with permission from their master.⁹⁷⁰ For his part, Nawawī mentions four characteristics it is preferable the finder have. First, he gives preference to someone who is wealthy over someone who is poor, even though he recognizes that other jurists hold them equal. However, he withholds this preference in cases where doubts exist regarding the finder’s supposed wealth.⁹⁷¹ Second, Nawawī preferences city/town dwellers over both nomads and rural inhabitants.⁹⁷² His reasoning seems to rest primarily on the fact that it is more likely that the abandoned child is from a densely populated town as opposed to its outskirts and he is apprehensive about moving the child away from familiar territory.⁹⁷³ Third, Nawawī favors a person whose fairness has been proven over time (*man ẓaharat ‘adālatuhu bi l-ikhtibār*).⁹⁷⁴ Finally, like other jurists, he states a preference for someone who is free as

⁹⁶⁸ Muzanī, *Mukhtaṣar*, 185.

⁹⁶⁹ Muzanī, *Mukhtaṣar*, 185.

⁹⁷⁰ Qarāfī, *Dhakhīra*, vol. 9, 131.

⁹⁷¹ Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 486.

⁹⁷² Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 486.

⁹⁷³ Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 488-89.

⁹⁷⁴ Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 486.

opposed to a slave.⁹⁷⁵ Overall, when considering qualities for a finder most jurists seem to center their considerations on what they consider the child's long-term interests. They are especially concerned with factors that will bring greater stability to the child's upbringing.

Most jurists also distinguish between finders on the basis of their religious affiliation. In general, they do not permit a non-Muslim to assume caretaking duties over a Muslim foundling, but exercise more flexibility when it comes to Muslims caring for non-Muslim children.⁹⁷⁶ Of course, the key issue is determining the religion of a child about whom nothing is known. This issue is instructive for a number of reasons. First, in the easy rescue scenario no inquiry was made into the religion of the individual drowning. This is indicative of the supremacy jurists give to the preservation of life, such that in the easy rescue scenario we see Islamic legal duties that are owed to all human beings: the moral community is expanded.

Second, the duty to foundlings puts forward a more advanced question than that raised with drowning: in a less urgent situation, what duties does a Muslim owe to a vulnerable individual who is not Muslim? Are Muslims absolved of the duty to "rescue"

⁹⁷⁵ Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 486.

⁹⁷⁶ Muzanī, *Mukhtaṣar*, 185; Marghīnānī, *al-Hidāya*, vol. 4, 363-64.

a child if it is determined that he is a non-Muslim? Third, if they are absolved from this duty, is the reason simply because Muslims do not owe any duties to non-Muslims or is the sanctity of religion being considered alongside the sanctity of life? It might be argued that Muslim jurists view religious identity as sacred such that, despite their own faith convictions, they consider it in the child's long-term interests to return to a familiar religious context even if it is non-Muslim. This is no small ethical concession especially if we consider it within the framework of "enjoining right" and "forbidding wrong." Here, despite the fact that jurists would agree that a non-Muslim context is epistemologically wrong, they obligate returning the child to that context.

In order to determine the foundling's religion, jurists begin by considering the demographic makeup of the area where he is discovered. According to Muzanī, Shāfi'ī said it was permissible for a child found in a city inhabited almost exclusively by non-Muslims to be taken in by a non-Muslim. In that circumstance, the child is considered non-Muslim until he comes of age, at which point he can choose Islam.⁹⁷⁷ Similarly, Shīrazī argues that if a child is found in a Muslim country among Muslims or in a Muslim locality captured by non-Muslims then he should be considered a Muslim. However, if he

⁹⁷⁷ Muzanī, *Mukhtaṣar*, 185. For instance, in the caretaking of a non-Muslim, they favor a Muslim over a *dhimmī*. See, Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 486.

is found in a locality where there are no Muslims then he should be considered a non-Muslim.⁹⁷⁸ While other jurists focus exclusively on the demographics of an area's inhabitants, Ibn Qudāma also includes an assessment of who holds political power locally. Hence, he considers the default religion of any foundling to be Islam as long as they are found in territory under Muslim political control. The only exception to this scenario would be a case in which, despite the presence of a Muslim ruler, the inhabitants of a particular locality were exclusively non-Muslim; in this case, the foundling should be treated as a non-Muslim.

For territories under the control of non-Muslims, but where Muslims also reside, Ibn Qudāma notes that two opinions exist. One opinion holds that the foundling should be treated as non-Muslim because the territory is under the political control of non-Muslims. The second opinion advocates for the child being considered a Muslim because, all things equal, a preference should be given to Islam.⁹⁷⁹ In some respects this second opinion betrays the widely-held Islamic theological position that, in their primordial state, human beings all begin as “muslims”; their innate religious disposition is Islam and only after birth do religious labels attach. Hence, preferring Islam for the foundling is

⁹⁷⁸ Shīrāzī, *Tanbih*, 90-91.

⁹⁷⁹ Ibn Qudāma, *al-Kāfi*, vol. 3, 465.

simply restoring the child to his original state before it was disrupted by the circumstances of his birth. Furthermore, these two juristic opinions also offer insight into how jurists weigh political power in their decisions about the best interests of the foundling. In the situation that Ibn Qudāma describes, non-Muslims control political authority, but presumably Muslims have some level of social dominance. Hence, the question arises as to what is in the best interests of the child: being a part of a community that is politically dominant or one that is social dominant? Some jurists see the social dominance to be powerful enough to overcome the influence of non-Muslim political rule, while others, possibly taking a more pragmatic approach, defer to political power as a controlling factor.

Obligation of Care

With regard to why taking custody of a foundling is a *kifāya*-duty, jurists offer two levels of argumentation: one level involves the practicalities of policy and the other more abstract moral questions. These moral questions in the context of foundlings share similarities with the underlying concerns when discussing easy rescue. My classification of caring for foundlings as a duty to rescue arises out of the fact that in both cases—easy rescue and foundlings—the central preoccupation of jurists is preventing the death of a

vulnerable individual. Hence, when discussing the foundling-duty Ghazālī argues that it is *kifāya* for two reasons: to encourage cooperation in good works and save children from “demise.”⁹⁸⁰ Shīrāzī has a more expansive idea based on Q 5/al-Māʾidahh:32, which states that “whoever saves a life it is as if they have saved all of humanity.” He notes that rescuing someone from harm is obligatory, just like feeding a starving person, because in both cases there is the potential for a person’s demise.”⁹⁸¹ Likewise, Marghīnānī says that taking care of a foundling becomes obligatory if one thinks that the child will perish (*wa-in ghalaba ʿalā ḡannihi ḡayāʿuhu fa-wājib*).⁹⁸²

Building on the idea of saving lives, other jurists offer a more direct connection between caring for a foundling and the easy rescue of someone drowning. Ibn Qudāma and Māwardī say the foundling-duty is *kifāya* because it saves a human being from perishing (*li-annahū injāʿ ādamī min al-halāk*) in the same fashion that rescuing a drowning person would (*ka-takhlīṣ al-gharīq*).⁹⁸³ Qarāfī offers the same analogy but speaks of it in more inflated terms arguing that this is “classified as a principle of preserving life” and

⁹⁸⁰ Ghazālī, *al-Wasīṭ*, vol. 4, 303. Also see v. 4, 306.

⁹⁸¹ Shīrāzī, *Muhadhdhab* vol. 2, 312. The verse Q 5/al-Māʾidahh:32 reads “On account of [his deed], We decreed to the Children of Israel that if anyone kills a person– unless in retribution for murder or spreading corruption in the land– it is as if he kills all mankind, while if any saves a life it is as if he saves the lives of all mankind. Our messengers came to them with clear signs, but many of them continued to commit excesses in the land.”

⁹⁸² Marghīnānī, *al-Hidāya*, vol. 4, 361.

⁹⁸³ Ibn Qudāma, *al-Kāfī*, vol. 3, 465; Māwardī, *al-Ḥawī al-kabīr*, vol. 8, 34.

about which “every community and revealed book agree.”⁹⁸⁴ In other words, he is making a universalist argument that is only tangentially connected to Islamic scripture and even then not unique. Furthermore, as in the case of rescuing a drowning person, the foundling-duty is not removed until the threat of destruction subsides.⁹⁸⁵ Jurists go to significant lengths to analogize the foundling to a drowning person, as well as emphasize the fact that this duty is owed to humans in general. Thus, even though there might be discussion on whether it would be more appropriate for a Muslim or a non-Muslim to care for a foundling of unknown religion, there is no debate over the fact that the foundling must be cared for by someone. Similar to the case of drowning, jurists construct the foundling-duty as one that Muslims owe to all human beings, not just their co-religionists.

As with other *kifāya*-duties, jurists also discuss the point when the foundling-duty is triggered and proximity plays an important role. For some jurists, such as Māwardī, simple “knowledge” of a child’s status as a foundling is enough to trigger for the creation of a duty to rescue the child and take responsibility for their upbringing.⁹⁸⁶ Presumably,

⁹⁸⁴ Qarāfī, *Dhakhīra*, vol. 9, 131.

⁹⁸⁵ Qarāfī, *Dhakhīra*, vol. 9, 131.

⁹⁸⁶ Māwardī, *al-Ḥawī al-kabīr*, vol. 8, 34. This is also the opinion of other jurists. See, Shīrāzī, *al-Tanbīh*, 90-91.

if one has sole knowledge of the foundling then, like other *kifāya*-duties with only one possible performer, the duty is *‘ayn* until more potential caretakers arrive. Ibn Ḥazm requires some physical proximity, making it “obligatory” (*farḍ*) on anyone who “comes across” a foundling to take them in; he also requires their custodianship come with a firm commitment to the child’s preservation.⁹⁸⁷

Like others, Ibn Ḥazm bases this on the scriptural imperative to work together for righteous ends, but more importantly on the previously mentioned verse Q 5/al-Mā’idah: 32. Ibn Ḥazm notes that “there is no sin greater than the sin of one who wastes a young sinless Muslim by allowing him to die of hunger or cold or to be eaten by dogs” (*la ithm a‘ḍam min ithm man aḍā‘a nasama mawlūda ‘alā al-islām ṣaghīra la dhanb laha ḥatā tamūt jaw‘an wa-bardan aw ta’kuluhu al-kilāb*).⁹⁸⁸ No other jurist speaks of failing to perform the duty with such severity, elevating it to a major sin. In fact, Ibn Ḥazm goes even further, implying that a severe penalty should be instituted on anyone that willfully neglects a foundling. He argues that anyone who allows a life to waste away due to neglect will be “guilty of intentional murder” (*huwa qātil nafs ‘amdan bi-la shakkin*),

⁹⁸⁷ Ibn Ḥazm, *Muḥallā*, vol. 8, 274.

⁹⁸⁸ Ibn Ḥazm, *Muḥallā*, vol. 8, 273-274. One interesting thing to note regarding Ibn Ḥazm’s discussion on the obligation to care here: he does not specify what type of obligation exists. One can assume that the obligation is at least individualized to the person who “comes across” the abandoned child, but there is no indication whether it would function as a *kifāya* duty otherwise.

essentially advocating for nonperformance of the foundling-duty to be punished with death.⁹⁸⁹ By analogizing failure to perform the foundling-duty with intentional murder, Ibn Ḥazm is instituting the harshest penalty in Islamic criminal law for not performing a rescue that you were capable of performing. He supports his position by quoting a Prophetic ḥadīth that put things starkly: “whoever is not merciful with people, God will not be merciful with them” (*man la yarḥam al-nās la yarhamu Allāh*).⁹⁹⁰ Ibn Ḥazm’s position here is particularly important because jurists rarely, if ever, connect nonperformance of a *kifāya*-duty to criminal sanction.⁹⁹¹ Furthermore, I have found no other instance in the duty to rescue context where any link is made between nonperformance and criminality, even if there is a penalty. This suggests that jurists are likely using these duties to rescue as a space for moral speculation without fully considering practical enforcement or deterring nonperformance. Even Ibn Ḥazm’s rare expression of criminal sanction for not performing the duty is less related to enforcement as it is to his registering the seriousness of the ethical failure.

⁹⁸⁹ Ibn Ḥazm, *Muḥallā*, vol. 8, 274.

⁹⁹⁰ Ibn Ḥazm, *Muḥallā*, vol. 8, 274. It should be noted that for certain Ḥanafī jurists, even the abandonment of a child “for whatever reason” is sinful and worthy of punishment such that they require the sultān apply a discretionary penalty (*taʿzīr*). Sujimon, “Foundling,” 359; See also, Sarakhsī, *Mabsūt*, vol. 10, 209.

⁹⁹¹ There is another instance where Nawawī mentions a situation where the community insists on rejecting a ruler’s command that they provide for a foundling. In that scenario, Nawawī states that they should receive capital punishment (*wa-in imtanaʿū athimū kulluhum wa-ṭalabuhum al-imām fa-in aṣarrū qātiluhum*). Nawawī, *Rawḍat*, vol. 4, 492.

Jurists also discuss whether the foundling-duty can be abandoned after someone begins to undertake it. Generally, the *kifāya* doctrine operates under the rule that once performance of a *kifāya*-duty has been initiated it must be continued until completion. The *kifāya*-doctrine has standard exceptions for situations where an individual loses the capacity to perform and these exceptions apply to the foundling-duty as well. In general, many jurists, particularly the Ḥanafīs, require that once a foundling is discovered, rescued and taken into custody they not be returned to where they were found: doing so constitutes “nonperformance of the duty.”⁹⁹² However, others allow someone to forgo the duty on the basis of a broad exception relating to their personal abilities. For instance, consistent with Ghazālī’s opinion, Nawawī notes that the child may be returned if the finder lacks the capacity to raise a child.⁹⁹³ Qarāfī offers another situation where performance might be suspended: a conflict with the finder’s initial intention. He envisions two scenarios: either the person intended to perform the duty by taking the child into his home or the person intended only to bring the child to the attention of political authorities. In the first case, Qarāfī considers it impermissible to reject a child after having taken custody with the intention of raising the child. Alternatively, he notes

⁹⁹² Sujimon, “Foundling,” 359.

⁹⁹³ Nawawī, *Rawḍat al-Ṭālibīn*, vol. 4, 484.

that if the child is taken simply with the intention of notifying the state (*imām*) of its existence then it is permissible subsequently to return the child to the location where it was found.⁹⁹⁴ This view is shared by other jurists who believe the finder's duty is simply to "bring the child to the political authorities" and it is then for the authorities to "identify an appropriate person to care for the foundling."⁹⁹⁵

Jurists again seem to be staking out an ethical position here. First, while not stated explicitly, one might speculate that jurists understood the potential psychological trauma that would be inflicted on a child who was returned after having been found. In some respects, one could conceive of it like throwing a person back into the river who you had just rescued from drowning. Not only would this be nonperformance of the duty, but the finder would now become a cause of the foundling's condition. Second, jurists only contemplate two scenarios of either intending to take the child into custody or of bringing the child's existence to the attention of the state. Neither scenario contemplates an option of the child being neglected or left uncared for. Hence, even where returning the child is considered a possibility it is only as long as some other caretaker assumes responsibility for the child. To return them to where they were found without an

⁹⁹⁴ Qarāfī, *Dhakhīra*, vol. 9, 131.

⁹⁹⁵ Sujimon, "Foundling," 379.

alternative caretaker would mean again subjecting them to potential demise since there is no guarantee of rediscovery.

Shared Responsibility: The State and Community as Caretakers

Building on the last point, a peculiar aspect of the foundling duty is the availability of another entity for the duty's performance: the state. Ordinarily, *kifāya*-duties involve a shared responsibility between individuals and the community, where individuals perform in order to satisfy the collective duty imposed on their community of residence. However, for some duties, there is also a role for the state, primarily in providing oversight over the sufficiency of performance. For instance, specifically in the context of *jihād*, the state may provide guidelines as to how the duty is satisfied, such as, determining the number of performers necessary to complete the duty, whether performance must occur immediately or can be delayed, and how the duty should be performed. Yet, despite having a regulatory role, jurists do not contemplate the state's responsibility including *actual* performance of duties.

However, for the foundling-duty, the state's responsibility to perform expands in significant ways, essentially functioning in parallel to the community's role. Jurists contemplate circumstances in which the state must assume a direct role in caring for

abandoned children. In essence, the state functions as a guarantor for the finder's performance of the duty and, by extension, their ethical shortcomings. Where the finder's inability to perform is to the degree that the child's interests are comparatively better met by the state, the state's responsibility is triggered. Specifically, jurists argue that when a foundling has no guardian, the *sulṭān* must be regarded as its "legitimate guardian" in his role as the Muslim community's representative and the one conferring the rights owed to them.⁹⁹⁶

Hence, in considering a child's welfare and best interests, jurists will shift the foundling-duty from the community (specifically, individuals within it) to the state; the state must then assume primary responsibility for the child. However, the state's duties are different than those of an individual guardian in the same situation. The state has a duty to provide for the child's upbringing and wet nursing, but is not required to provide an inheritance or arrange for the child to be married.⁹⁹⁷ For instance, one scenario jurists discuss is where the moral character of a finder is called into question. Muzanī focuses specifically on trustworthiness as a character trait which, if absent in the finder, triggers a more active role for the state in performance of the duty. If the finder is trustworthy

⁹⁹⁶ Sujimon, "Foundling," 379.

⁹⁹⁷ Qarāfī, *Dhakhīra*, vol. 9, 131.

then Muzanī requires no further inquiry: the finder possesses exclusive responsibility for the child.⁹⁹⁸ However, where the finder is deemed untrustworthy, the child automatically becomes a ward of the state and is the “ruler’s responsibility.”⁹⁹⁹

Furthermore, jurists are interested in more than just the trustworthiness of the finder. They also examine trustworthiness as it pertains to the inhabitants and local political authority where the finder lives. Local dynamics are able to affect how jurists conceive of the nature of the duty and where the burden for it lies. If a territory is inhabited by “trustworthy” people and ruled by a “just” political authority, then the analysis is straightforward: the finder can take custody of the foundling. In these cases, the only matter that requires additional attention is whether public notification of this custodianship is necessary or not.¹⁰⁰⁰ In other situations, where a ruler may be unjust or residents untrustworthy, jurists are concerned primarily with whatever option is most likely to insure the “found property’s safekeeping,” which, in this case, is the child

⁹⁹⁸ Muzanī, *Mukhtaṣar*, 185. He notes that the finder must provide formal testimony that the child he found is abandoned and account for all the child’s property (*bimā wajada lahu*). He is required to personally spend on the child at a level that would be appropriate based on custom (*ya’maruhu bi-l-infāq minhu ‘alayhi bi-l-ma’rūf*). Any property belonging to the foundling that the finder utilizes on himself, without the ruler’s permission, will be considered a debt and the finder will bear responsibility for it. Ibid.

⁹⁹⁹ Muzanī, *Mukhtaṣar*, 185.

¹⁰⁰⁰ Ibn Rushd, *Bidāyat*, vol. 2, 368.

itself.¹⁰⁰¹ Another connected consideration is the issue of child enslavement. In short, jurists like Qarāfī require a foundling to be placed under state guardianship when the trustworthiness of the finder is questionable and a risk exists that the finder might make the child a slave.

It is noteworthy that not only are jurists placing the child's well-being at the center of their analysis, but part of this analysis also involves assessing the fitness of the finder through broad moral traits like trustworthiness. Their assessment recognizes that a "rescue" occurring in the context of foundlings is perpetual as compared to someone drowning. In the latter, the rescuer's duty ceases after the person is pulled out of the water: their moral act is simply in performing the rescue. However, for foundlings the rescue persists beyond the initial discovery and jurists raise the moral fitness of the finder as part of the ethical obligation associated with caring, providing for and bringing up a child. Furthermore, they charge the state with serving as a guarantor of the child's upbringing, intervening should the finder not meet the standard of ethical fitness.

In addition to adjusting the foundling-duty on the basis of the finder's character, or lack thereof, jurists are also cognizant of the practical considerations behind the obligation and reassign the duty based upon the financial support the individual, and by

¹⁰⁰¹ Ibn Rushd, *Bidāyat*, vol. 2, 368.

extension the community, can provide the child. A variety of different financial arrangements are contemplated, including both grants and loans, in order to support the foundling. These arrangements generally involve three potential sources of wealth: the finder's existing fortune, the assets that accompanied the foundling when he was discovered and the state's public treasury. As a baseline, many jurists, like Ibn Rushd, adhere to the opinion that "wealth is not a required condition for custodianship."¹⁰⁰² However, this position probably operates on the assumption that the state will serve as a guarantor to allow finances not to be a limitation. It is also an indication that the ethical concerns over character traits is a more pressing matter for jurists than financial capacity.

For many Ḥanafī jurists this assumption is explicitly stated in their position: "if the foundling has no money or property, the public treasury (*bayt al-māl*) is responsible for its maintenance and upbringing."¹⁰⁰³ Kāsānī echoes this view, suggesting that as a final resort, when other options have been exhausted, the public treasury is required to care for the foundling.¹⁰⁰⁴ Similarly, Marghīnānī requires the foundling be "provided for

¹⁰⁰² Ibn Rushd, *Bidāyat*, vol. 2, 374.

¹⁰⁰³ Sujimon, "Foundling," 363. Interestingly, Māwardī notes that in cases where the treasury lacks funds to support public interest and amenities then there is an obligation that exists on the Muslim community to provide it as a *kifāya*-duty. Māwardī, *Aḥkām*, 279.

¹⁰⁰⁴ Kāsānī, *Badā'ī' al-ṣanā'ī'*, vol. 6, 199.

from the public treasury” (*nafaqatuhu fī bayt al-māl*) in situations of “need,” an opinion he bases on rulings by both ‘Umar and ‘Alī.¹⁰⁰⁵ He assigns responsibility to the public treasury because the foundling is a Muslim “unable to earn,” lacking both wealth and the support structure of close relatives. In fact, from a legal standpoint, Marghīnānī analogizes the foundling to a physically disabled person who automatically becomes a ward of the state by virtue of being handicapped.¹⁰⁰⁶ In other words, he considers abandonment as a type of disability. Furthermore, Marghīnānī makes the treasury liable for any compensation arising out of the foundling’s civil or criminal offences.¹⁰⁰⁷

This position is not exclusive to the Hanafīs though. For instance, Muzanī notes that in situations where the finder possesses all other pre-requisites for custodianship except adequate finances, the ruler is obligated to utilize the state’s wealth to provide for the foundling (*fa-in lam yūjad lahu māl wajaba ‘alā al-ḥākim an yunfiq ‘alayhi min māl Allāh*).¹⁰⁰⁸ He contemplates a *kifāya*-duty that is *shared* by the state and the community. In other words, if an adequate custodian is not present within the community, the state

¹⁰⁰⁵ Marghīnānī, *Hidāya*, vol. 4, 361.

¹⁰⁰⁶ Marghīnānī, *Hidāya*, vol. 4, 362.

¹⁰⁰⁷ Marghīnānī, *Hidāya*, vol. 4, 362. While it is not especially significant to the discussion here, it would be worth exploring how Marghīnānī would consider a foundling who is non-Muslim. Does the state assume the same responsibilities for this child as for a Muslim child? Would a non-Muslim child also be entitled to support from the public treasury?

¹⁰⁰⁸ Muzanī, *Mukhtaṣar al-Muzanī*, 185.

must partner with the community to meet the burden of the obligation.

Bearing the above in mind, Kāsānī relates an important point that other jurists raise as well: there is no recourse to the public treasury if a foundling's upkeep can be funded from the child's own property.¹⁰⁰⁹ In fact, a considerable portion of the legal discussion around foundlings centers on who has rights to the property in the foundlings possession when they are discovered. According to both Muzanī and Māwardī, Shafī'i's position was that anything found on the child's riding animal (*dābbatihi*) or bed (*firāshihi*) or on his person (*‘alā thawbihi*) constitutes his property (*fa huwa lahu*).¹⁰¹⁰ Ibn Ḥazm says that whatever you find on his person is his because a young person is capable of owning property and everything he possesses should be used for his benefit.¹⁰¹¹ Marghīnānī supports this position as well, noting that if wealth is discovered on the foundling's person, or attached to an animal he is riding, it belongs to him.¹⁰¹² A finder who spends the foundling's wealth for his upkeep must do so in line with a judge's guidelines. The authority to spend this money resides with the judge (*li-l-qāḍī wilāyat ṣarf*), but a foundling has the right to spend from his own wealth without the judge's permission.¹⁰¹³

¹⁰⁰⁹ Kāsānī, *Badā'i' al-ṣanā'i'*, vol. 6, 199.

¹⁰¹⁰ See, Muzanī, *Mukhtaṣar*, 185; Māwardī, *al-Ḥāwī al-kabīr*, vol. 8, 34.

¹⁰¹¹ See, Ibn Ḥazm, *Muḥallā*, vol. 8, 276.

¹⁰¹² See, Marghīnānī, *al-Hidāya*, vol. 4, 365.

¹⁰¹³ See, Marghīnānī, *al-Hidāya*, vol. 4, 365.

Marghīnānī also gives the finder, in his position as guardian, the authority to utilize a foundling's wealth to purchase items necessary for the foundling's well-being (*lā budda lahu minhu*), such as food and clothing.¹⁰¹⁴

While the above discussion relates to financial arrangements obligating the state to provide grants for the maintenance of a foundling, jurists also discuss how the duty might be satisfied in other scenarios. Specifically, they recognize that the state may not always have discretionary funds in the public treasury to satisfy its role in the foundling-duty. Nawawī suggests that in these cases the community must reassume the burden of the foundling exclusively, as a *kifāya*-duty, without the state as a guarantor: under no circumstances can either party let the child perish. As part of its duty, the state must take a more active role managing the foundling's affairs. For instance, the ruler is required to gather the town's wealthy individuals and divide responsibility for the child's maintenance between them (*qassamta 'alayhim nafaqatahu*) and the state (*ja'ala nafsahu minhum*).¹⁰¹⁵

In addition, similar to Ibn Ḥazm's outlier position instituting punishment for failure to perform the foundling-duty, Nawawī penalizes a community that refuses to

¹⁰¹⁴ See, Marghīnānī, *al-Hidāya*, vol. 4, 365.

¹⁰¹⁵ Nawawī, *Rawḍat*, vol. 4, 491.

provide state-mandated support for a foundling. To begin with, he reiterates the standard position that every person in that town will have committed a sin due to the nonperformance of a *kifāya*-duty. More importantly, Nawawī says that if the community insists (*aṣarrū*) on maintaining their position of nonperformance after an order from the ruler (*ṭalabahum al-imām*), then lethal force can be used to compel their compliance (*qāṭalahum*).¹⁰¹⁶ If the situation reaches an impasse (*‘inda al-ta‘adhdhur*), he requires taking a loan, with a fixed return, from the public treasury on behalf of the foundling. The difference between the grant, as opposed to the loan, is that no repayment to the public treasury is required in the case of the former.¹⁰¹⁷

The loan arrangement is contemplated by many jurists as an acceptable alternative to the grant. In general, it comes under consideration in situations where the state lacks the financial flexibility to provide monetary gifts so must offer monetary debt instead. Nawawī states that when a foundling has no money, the ruler (*imām*) can seek a loan from the public treasury for the child’s upkeep.¹⁰¹⁸ However, it is not immediately clear who carries the debt: the finder or the foundling. The interesting aspect of this arrangement is that while it requires the state to assume responsibility for the

¹⁰¹⁶ Nawawī, *Rawḍat*, vol. 4, 492.

¹⁰¹⁷ Nawawī, *Rawḍat*, vol. 4, 492.

¹⁰¹⁸ Nawawī, *Rawḍat*, vol. 4, 491.

foundling's financial welfare, it does not impose a requirement to provide this support without expectation of repayment. In other words, the obligation can exist as both a form of charity and a transaction loan.

Similarly, jurists also contemplate the finder providing a loan from his own wealth for the foundling's upkeep, as opposed to a charitable grant. Kāsānī states that a finder is permitted to take care of a foundling with the understanding that he will be reimbursed from the child's property. However, he places a condition on this loan: it must be agreed upon *prior* to the start of the custodial relationship and by judicial decree (*bi-idhn al-qāḍī*), with the state acting as a proxy for the minor foundling.¹⁰¹⁹ The finder cannot retroactively alter the arrangement from a grant to a loan. If no such agreement existed at the start of the relationship then the finder has waived his right to claim repayment from the foundling.¹⁰²⁰ In cases where a judge compels the finder to provide maintenance for the foundling as part of his "sovereign power of compulsion" (*wilāyāt al-ilzām*), the finder is entitled to recover these expenses from the foundling when he becomes an adult.¹⁰²¹ A judicial order to provide maintenance is required in order to

¹⁰¹⁹ Kāsānī, *Badā'ī' al-ṣanā'ī'*, vol. 6, 199. He cites a Prophetic tradition that says "the ruler is a guardian for one who does not have a guardian" (*al-sulṭān walī man la walī lahu*). Ibid.

¹⁰²⁰ Kāsānī, *Badā'ī' al-ṣanā'ī'*, vol. 6, 199.

¹⁰²¹ Sujimon, "Foundling," 364.

recover the funds in the future. If the finder provides maintenance without a judge's prior consent then it is considered a "charity" (*tabarru'*) and the foundling cannot be forced to pay it back.¹⁰²²

A succinct summary of the state's role is recounted by Ibn Qudāma in a story about 'Umar narrated by Sunayn Abū Jamīla where the latter says (emphasis added): "I found a foundling, so I brought him to 'Umar who said: "Go away, he is free and upon you is his guardianship and upon us is his financial expense."¹⁰²³ A more detailed summary of the state's role in the foundling duty is found in M.S. Sujimon's discussion of the predominant view of medieval Ḥanafī jurists on this matter:

Ultimately, it was the state's responsibility to provide the foster father with the means to provide for the child. The state generally seems to have retained the patronage of the child, although this may not always have been the case. Thus, the state is normally responsible for the bloodwit of the foundling; and the state, represented by a *qāḍī*, may act as the marriage guardian (*walī*) of a female foundling. The state also may inherit from the foundling.¹⁰²⁴

Ancillary Duties to Rescue

The juristic discourse on the subcategory of duties to rescue within the *kifāya* category is dominated by the two duties discussed above: easy rescues and the foundling-

¹⁰²² Sujimon, "Foundling," 365. This was specifically the position of Abū Hanīfā.

¹⁰²³ Ibn Qudāma, *al-Kāfi*, vol. 3, 465.

¹⁰²⁴ Sujimon, "Foundling," 379.

duty. However, other acts that jurists classify as *kifāya* might also be worthy of consideration as duties to rescue. This is primarily because the ethical considerations that underlie the duties discussed above also play a role in these other duties, though often less explicitly. Specifically, the main consideration is the preservation of human life, often characterized as preventing its demise, and the extent of an individual's obligation towards this end. Unlike the widespread coverage given to the foundling-duty and easy rescue, the juristic discourse on these “ancillary” duties to rescue is more sporadic: some mention them while others omit them altogether. There seems to be no broad agreement as to whether these particular duties should constitute obligations and, thus, they are not a consistent part of the legal discourse. However, these discussions nonetheless shed further light on the legal thought underlying the development of the subcategory of duties to rescue. A few examples of these additional duties help illustrate the changing nature of the *kifāya*-duty and how the jurists' moral speculation on ethics touched other areas of law as well.

Assistance

Among the *kifāya*-duties that fit more readily into the subcategory of duties to rescue is a broad duty to “provide assistance” to the needy. Ordinarily, *zakat*, an ‘*ayn-*

obligation, might be considered the appropriate place for these acts of charity, but in the premodern period zakat functioned as a tax on its Muslim population that allowed the state to provide them various services, including ensuring their well-being to some degree. The *kifāya*-duty to assist the needy exists outside the welfare state and contemplates the type of responsibility members of the community owe to others in the community in need of immediate rescue. For example, Ibn Baṭṭāl obligates feeding the hungry in one's community as a *kifāya*-duty, specifically feeding those individuals without the means to secure their own meals. In fact, not only does he elevate feeding the needy to the level of *kifāya*-duty, he implies that, in certain contexts, the duty may acquire shades of an *ʿayn*-obligation as well. His argument here has parallels to the easy rescue situation: capacity to intervene, immediacy of need and proximity to the vulnerable individual.

Ibn Baṭṭāl argues that it is mandatory for a rescuer to intervene if someone faces an imminent prospect of death by starvation where two conditions exist. First, the rescuer must possess the ability to respond to the situation (*wa-ʿindak mā tujībuhu bi-hi*) and, second, they must be the only person positioned to do so at that time.¹⁰²⁵ In this

¹⁰²⁵ Ibn Baṭṭāl, *Sharḥ saḥīḥ al-Bukhārī*, vol. 5, ed. Abū Tamīm Yāsir b. Ibrāhīm (Riyadh: Maktabat al-Rushd, n.a.) 210.

situation, Ibn Baṭṭāl follows the principle that “preserving his life is obligatory for you” (*al-fard ‘alayka fi iḥyā’ nafsīhi*).¹⁰²⁶ Furthermore, in further alignment with the duties to rescue, he notes that the obligation will be downgraded to an “exhortation” (*nadb*) if immediacy (*ḍarūra*) is lifted. In fact, in many respects one could easily consider this simply another example of an easy rescue as opposed to a separate duty to rescue.

There is also mention in the Prophetic tradition of “visiting the sick” and Ibn Baṭṭāl notes that opinion was split on this being a duty: some scholars believe it is a *kifāya*-duty and others consider it simply encouraged.¹⁰²⁷ The opinion that it was a *kifāya*-duty was not uncommon, as Ibn ‘Abd al-Barr reports various other unnamed scholars also holding it.¹⁰²⁸ He notes that Zāhirī jurists actually elevate visiting the sick to an ‘*ayn*-obligation: a classification opposed by the majority of scholars.¹⁰²⁹ The Zāhirī position is based on a ḥadīth that commands every person to engage in seven activities emphasized by the Prophet; one of them is visiting the sick.¹⁰³⁰

¹⁰²⁶ Ibn Baṭṭāl, *Sharḥ saḥīḥ al-Bukhārī*, vol. 5, 210. Ibn Taymiyya also elevates feeding the hungry to the level of *kifāya*-duty, but adds clothing the poor as an additional duty as well. Ibn Taymiyya, *al-Fatāwā al-Kubrā*, vol. 4, 617.

¹⁰²⁷ Ibn Baṭṭāl, *Sharḥ saḥīḥ al-Bukhārī*, 211.

¹⁰²⁸ Ibn ‘Abd al-Barr, *Jāmi‘at Bayān*, vol. 1, 58.

¹⁰²⁹ Ibn ‘Abd al-Barr, *Jāmi‘at Bayān*, vol. 1, 58.

¹⁰³⁰ Ibn ‘Abd al-Barr, *Jāmi‘at Bayān*, vol. 1, 58.

Hospitality

A less common duty, that is more tangential to the duty to rescue, is mentioned by Abū Bakr b. al-ʿArabī in a commentary on Q 11/Hūd:69.¹⁰³¹ He notes the opinion of Layth b. Saʿd, which departed from other scholars, that providing hospitality to guests is obligatory. Layth b. Saʿd based this view on a Prophetic ḥadīth that stated “whoever believes in God and the Last Day let him honor his guest, his welcome is for a day and a night and whatever is more than that is charity (*sadaqa*).”¹⁰³² In another narration, the following is added: “It is not licit (*ḥalāl*) for a guest to stay with someone for so long that they become a burden upon them.” Ibn al-ʿArabī notes that “scholars of law” (*ʿulamāʾ al-fiqh*) did not consider hospitality an obligation but simply a demonstration of “honorable moral character and the best kind of conduct between creatures, or God’s creatures” (*innamā hiya min makārim al-akhlāq wa-ḥusn al-muʿāmalah bayna al-khalq*).¹⁰³³ For these jurists, the statement in the ḥadīth is an “exhortation” (*nadb*) not an obligation since to “honor one’s guest” is inherently voluntary; there is no honor if you are required to do it.¹⁰³⁴ Ibn al-ʿArabī also notes that some people say the obligation has been abrogated; it

¹⁰³¹ The verse reads: “To Abraham Our messengers brought good news. They said, ‘Peace.’ He answered, ‘Peace,’ and without delay he brought in a roasted calf.” *The Qurʾān*, 141.

¹⁰³² Ibn al-ʿArabī, *Aḥkām*, vol. 3, 20.

¹⁰³³ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 20.

¹⁰³⁴ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 20.

existed at the beginning of Islam but not anymore (*fī ṣadr al-Islām thumma nusikhan*). He does not give this opinion much weight, classifying it as “weak” (*daʿīf*).¹⁰³⁵

Instead, Ibn al-ʿArabī proceeds to discuss another ḥadīth which he uses as the framework for how the obligation should be understood. The ḥadīth, narrated from Abū Saʿīd al-Khudrī, recounts an incident in which a group of travelers requested hospitality from a certain tribe. Instead of providing the support, the tribe told the travelers that any hospitality carried a condition: the travelers had to help the tribe’s ailing chief. The traveling group agreed to perform a healing incantation over the tribal chief in return for the community’s hospitality and proceeded to read the *fātiḥa*, which seemed to cure the chief’s ailment.¹⁰³⁶ For Ibn al-ʿArabī, the narration’s importance is that when the travelers, upon their return, informed the Prophet what happened, he did not express any displeasure at the tribe for failing to be hospitable. If the travelers had a right to hospitality from the tribe then the Prophet would have “informed them of this.”¹⁰³⁷

¹⁰³⁵ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 20.

¹⁰³⁶ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 21. There seem to be various versions of this narration, but I have been unable to find the exactly worded narration used by Ibn al-ʿArabī in any of the major collections. For different versions, see, Ṣaḥīḥ Muslim, Chapter 39 (“The Book of Greetings,” *kitāb al-salām*), Section 23 (“The Permissibility of Accepting a Reward for Reciting an Incantation using the Qurʾān and Supplications,” *bāb jawāz akhdh al-ujrah ʿalā al-ruqyah bi-l-Qurʾān wa-al-adhkār*); Sunan Abū Dawūd, Chapter 29 (“Medicine,” *kitāb al-ṭib*), Section 19 (“How an incantation is to be used,” *bāb kayf al-ruqā*); Ṣaḥīḥ al-Bukhārī, Chapter 76 (“Medicine,” *kitāb al-ṭib*), Section 39 (“Spitting in an Incantation,” *bāb al-naḥṭ fī al-ruqyah*).

¹⁰³⁷ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 21.

Rather, Ibn al-ʿArabī says the ḥadīth shows that “in actuality, hospitality is a collective duty” (*al-ḍiyāfa ḥaqīqatan farḍun ʿalā al-kifāya*).¹⁰³⁸ That said, he does note that some scholars qualify this obligation further. They note that hospitality is obligatory (*wājiba*) in rural areas (*qurā*) because of the scarcity of food and water for visitors, as opposed to urban areas (*ḥawāḍir*), where resources are more plentiful (*mashḥūn*). Ibn al-ʿArabī concludes by noting that if a guest is destitute (*ʿadīm*) then the hospitality is obligatory.¹⁰³⁹

Here again we see strains of the same ethical rationale behind other duties to rescue with familiar patterns of immediacy, proximity and capacity structuring the obligation. For instance, the preference for making hospitality an obligation in rural settings is based on the immediacy of need. Resources are scarce in rural settings and any traveler passing through them will require support more urgently from whoever they meet. In the urban setting, support might be more readily available because resources are more plentiful. Likewise, Ibn al-ʿArabī recognizes the element of immediacy in a guest who is destitute versus one who just happens to be passing through. He requires that the destitute guest receive support right away. Furthermore, in all these

¹⁰³⁸ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 21.

¹⁰³⁹ Ibn al-ʿArabī, *Aḥkām*, vol. 3, 21.

cases, proximity and capacity is assumed since hospitality is being provided for a guest from one's own provisions. Even the automatic requirement that guests receive a few days of hospitality suggests a reluctance, possibly for ethical reasons, that jurists had in turning someone away who was seeking shelter and allowing them a few days to restore their well-being.

Marriage

Like hospitality, it is not immediately clear how marriage might fit into the duties to rescue. In fact, not all jurists are even convinced that marriage is an obligation: some consider it merely a permissible act. Those that consider marriage obligatory often debate whether it should be a *kifāya* or an *ʿayn*-obligation. Other jurists hold that marriage is a conditional obligation, arguing that there is consensus that “marriage is obligatory when someone is consumed by an uncontrollable sexual desire for women” and they are able to meet the financial burden associated with marriage.¹⁰⁴⁰ In this situation, it would be sinful *not* to marry.

In addition, jurists agree that at least one group consistently held the position

¹⁰⁴⁰ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 2, 228. Ibn Qudāma states that in situations where one lacks self-control, marriage becomes obligatory according to most scholars. Ibn Qudāma, *al-Mughnī*, vol. 9, 341.

that marriage is required: the Ṣāhirīs.¹⁰⁴¹ In fact, Kāsānī claims that their opinion was not only that marriage was obligatory, but that it was an ‘*ayn*-obligation “similar to fasting and prayer.”¹⁰⁴² As a result, Ṣāhirīs considered unmarried persons sinners if they had the physical and financial capability to marry.¹⁰⁴³ Its narrated that Dāwud b. ‘Alī, the founder of the Ṣāhirī school, required people to marry at least once in their lifetime (*yajib fī al-‘umr marratan wāhidatan*).¹⁰⁴⁴ His opinion was based on the language in Q 4/al-Nisā’: 3: “If you fear that you will not deal fairly with orphan girls, *marry* whichever [other] women seem good to you, two, three, or four. If you fear that you cannot be equitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias” (emphasis added).¹⁰⁴⁵ He reads this verse as containing an imperative command to *marry*

¹⁰⁴¹ Ibn Rushd, *Bidayat*, vol. 2, 1; Sarakhsī, *Mabsūṭ*, vol. 4, 193. The basis of this opinion is what they consider to be the direct command in both the Qur’ān and ḥadīth. Sarakhsī, *Mabsūṭ*, vol. 4, 193.

¹⁰⁴² Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 2, 228.

¹⁰⁴³ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 2, 228.

¹⁰⁴⁴ Ibn Qudāma, *al-Mughnī*, vol. 9, 341.

¹⁰⁴⁵ Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31. Māwardī responds to Ibn Dāwud reading this verse as a command by arguing that the verse is limited to promoting marriage to women of good character and is not suggesting a broader obligation. If it was then the obligation would apply in all conditions. Ibid. In addition, he notes that the later part of the verse presents a choice between marriage and taking a concubine (*milka al-yamīn*). He suggests that it does not make sense then that marriage is obligatory, but taking a concubine is not. Furthermore, he notes another verse, Q 4/al-Nisā’: 25, that juxtaposes marrying a free believer and slave believer. Māwardī points to a segment of the verse which states: “This is for those of you who fear that you will sin; it is better for you to practice self-restraint.” He argues that marriage with a slave is recommended for the person who cannot afford to marry a believing woman, but fears they will commit illicit sexual intercourse (*zinā*). Furthermore, if even that is not possible then the best course is to exercise self-restraint. Māwardī says that if self-restraint is considered the best

as opposed to a suggestion: “you *may* marry.”¹⁰⁴⁶ The imperative form for Ṣāhirīs always means you “must” engage in the act and have no option. In fact, Dāwud argues that there was consensus among Muḥammad’s Companions on this point because it was the position held by two of the Muslim community’s earliest luminaries: ‘Umar [b. al-Khaṭṭāb] and Mu‘ādh [b. al-Jabal].¹⁰⁴⁷ Furthermore, Dāwud makes use of a story from Mu‘ādh’s life where, on his deathbed, he reportedly asked to be married so that he “would not have to meet his Lord as a bachelor (*‘azab*).”¹⁰⁴⁸

Ibn Ḥazm confirms the Ṣāhirī view in *al-Muḥallā*, noting that “it is an obligation for anyone with the ability to copulate to follow one of two paths: find someone to marry or take a concubine.”¹⁰⁴⁹ His discussion of the obligation is primarily meant to be juxtaposed against celibacy, which he views negatively. Specifically, he mentions various ḥadīth which indicate that the Prophet forbade celibacy and Ibn Ḥazm contends that this

course in certain circumstances then marriage cannot be obligatory because otherwise self-restraint would actually be the worst option (*shar SP*). Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31.

¹⁰⁴⁶ I have altered the verse’s translation in the previous sentence. Muhammad Abdul Haleem translates the imperative command in the verse as “you may marry,” which is not how the Ṣāhirīs understood it. See, *The Qur’ān*, trans. M.A.S. Abdel Haleem, 50.

¹⁰⁴⁷ Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31.

¹⁰⁴⁸ Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31. Specifically, Mu‘ādh’s rationale was apparently that marriage is indicative of refinement of one’s soul (*taḥṣīn al-naḥs*). Māwardī counters the claim about both Companions by noting that their advice was either specific to their circumstances or meant to be viewed as something desirable not obligated. Ibid., 32.

¹⁰⁴⁹ Ibn Ḥazm, *Muḥalla*, vol. 9, 440. As proof to support his opinion, he notes a Prophetic ḥadīth that says people with the means to marry should marry otherwise they should fast. Ibid.

opinion was held by most early Muslims (*qawl jamā'a min al-salaf*).¹⁰⁵⁰ Zāhirī support for marriage as an *ʿayn*-obligation is premised on explicit textual support from the Qurʾān and Sunna.¹⁰⁵¹ On this basis, they consider the command to marry to be absolute, unless there is evidence to the contrary. Furthermore, Kāsānī notes their use of a legal maxim to advocate for the marital obligation: “anything necessary for performing an obligation is itself obligatory” (*wa-mā lā yutawaṣṣal ilā al-wājib illā bihi yakūn wājibān*).¹⁰⁵² The Zāhirīs argue that since abstaining from illicit sexual relations (*zinā*) is obligatory (*wājib*), and the only way to abstain from illicit sexual relations is through licit sexual relations (*nikāḥ*), thus licit sexual relations also become obligatory.¹⁰⁵³

Among the main Sunni legal schools, the Ḥanafīs, unlike the Mālīkīs or Shāfiʿīs mentioned earlier, were more likely to view marriage as an obligation even though they disagreed as to the details of the obligation. According to Kāsānī, they divided into two

¹⁰⁵⁰ Ibn Ḥazm, *Muḥalla*, vol. 9, 440. He also mentions a ḥadīth attributed to the Prophet’s wife ʿĀ’isha in which, responding to a question about celibacy, she cites and provides commentary for Q 13/al-Raʿad:38 (“We sent messengers before you and gave them wives and offspring...”) as a prohibition on celibacy. Ibid.

¹⁰⁵¹ Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 2, 228; Sarakhsī, *Mabsūṭ*, vol. 4, 193. One ḥadīth the Zāhirīs use as proof narrates the Prophet asking ʿAkāf b. Khālīd whether he had a wife, to which he responds in the negative. The Prophet then instructs him to get married because in his current state he was among the “brethren of the satanic forces” (*ikhwān al-shayāṭīn*). Ibid.

¹⁰⁵² Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 2, 228. Sarakhsī uses essentially the same words, but with a slight difference where *farḍ* is substituted for *wājib*: *wa-mā la yatawaṣṣil ilā al-farḍ illā bihi yakūn farḍan*. This difference is negligible for other schools, but not for Ḥanafīs. Sarakhsī, *Mabsūṭ*, vol. 4, 193.

¹⁰⁵³ Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 2, 228.

primary groups: those who think marriage is obligatory and those who do not. The latter group, which included scholars like Abū al-Ḥasan al-Karkhī (d. 340/951), said that marriage should be viewed as either a recommended (*mandūb*) or a commendable (*mustaḥabb*) act.¹⁰⁵⁴ Sarakhsī claims that the majority of jurists, excluding the Zāhirīs, considered marriage to be a “commendable supererogatory” act (*masnūn mustahab*).¹⁰⁵⁵ They base this opinion on a ḥadīth in which the Prophet reportedly said “whoever among you can afford to get married should and whoever cannot should fast because this will serve as a restraint [on your desires]” (*man istaṭāʿ minkum al-bāʿah fa-l-yatazawwaj wa-man lam yastaṭīʿ fa-l-yaṣum fa-inna al-ṣawm lahu wijāʿun*).¹⁰⁵⁶ Hence, fasting occupies the same station as marriage. However, fasting, apart from Ramadan, is not obligatory so marriage cannot be obligatory either since “it is not possible for something that is not obligatory to be substituted for something that is an obligation” (*ghayr al-wājib la yaqūm maqām al-wājib*).¹⁰⁵⁷

Furthermore, the Ḥanafīs argued that there were Companions of the Prophet who

¹⁰⁵⁴ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 2, 228.

¹⁰⁵⁵ Sarakhsī, *Mabsūṭ*, vol. 4, 193. He actually cites an interesting ḥadīth that says that “if you are a Christian monk then you have the right not to marry, but if you are Muslim then get married.” Sarakhsī, *Mabsūṭ*, vol. 4, 193.

¹⁰⁵⁶ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 2, 228.

¹⁰⁵⁷ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 2, 228.

never got married and, despite knowing this, the Prophet never admonished them for it, which indicates that marriage must not have been obligatory.¹⁰⁵⁸ They also note that when the Prophet or his Companions listed the obligations of faith they never included marriage in such lists.¹⁰⁵⁹ The Ḥanafīs also respond directly to the Zāhirī contention that marriage becomes obligatory based on the legal maxim that “anything necessary for performing an obligation is itself obligatory.” Sarakhsī argues that marriage is not the only means of preventing illicit acts that one is obligated to avoid; fasting can just as easily help one achieve the goal of shielding oneself from illicit sex.¹⁰⁶⁰ Hence, marriage is not a necessity.

Another group of Ḥanafīs considered marriage an obligation but disagreed as to the nature of that obligation. The basic distinction they made was between two types of obligation unique to Ḥanafī jurisprudence: *farḍ* (textual obligation) and *wājib* (reasoned obligation).¹⁰⁶¹ These jurists were themselves divided over whether it was a “reasoned

¹⁰⁵⁸ Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ*, vol. 2, 228.

¹⁰⁵⁹ Sarakhsī, *Mabsūṭ*, vol. 4, 193.

¹⁰⁶⁰ Sarakhsī, *Mabsūṭ*, vol. 4, 193.

¹⁰⁶¹ As noted earlier, the distinction that Ḥanafīs make between *farḍ* and *wājib* is that they consider *farḍ* to be “all the injunctions that are proven on the basis of a certain source that has no form of doubt to it.” On the other hand, *wājib* applies to those acts that are determined to be obligatory through reasoned deduction. Deen, *Islamic Law*, 97. As some scholars have noted, Abū Ḥanīfa considered the difference between these two concepts to be quite significant, relating that it is “like the difference between heaven and earth.” See, Reinhart, “*Farḍ* and *Wājib*,” 205 fn1.

collective obligation” (*wājib ‘alā sabīl al-kifāya*) or a “reasoned individual obligation” (*wājib ‘aynan*).¹⁰⁶² For his part, Kāsānī does not agree that marriage can be individually assigned as an obligation because failing to get married does not constitute sinful behavior. Instead he thinks at most it resembles collective obligations like *jihād* and funeral prayers where social responsibility is shared.¹⁰⁶³ His preference is to consider marriage as inherently permissible (*mubāḥ*) and lawful (*ḥalāl*), but not in the realm of obligation. However, Kāsānī acknowledges that marriage can also become an obligation, recommended or favored, depending on its need as a defense against illicit sexual relations (*zinā*).¹⁰⁶⁴

The Ḥanbalī jurist Ibn Qudāma notes a difference of opinion with regard to whether marriage is an obligation. The most prevalent (*mashūr*) opinion is that marriage is not obligatory except for the person who requires it as a defense against their own proclivities.¹⁰⁶⁵ On the other hand, he says that Abū Bakr ‘Abd al-‘Azīz considered marriage obligatory, regardless of its purpose, on the basis of an opinion by Ibn

¹⁰⁶² Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 2, 228.

¹⁰⁶³ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 2, 229. He centers his discussion on reading the “unqualified morphological patterns denoting obligation on the basis of [their] context” (*ṣiḡhat al-amr al-muṭlaqa ‘an al-qarīna*) as containing both obligation (*farḍiyya*) and recommendation (*nadab*).

¹⁰⁶⁴ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 2, 229.

¹⁰⁶⁵ Ibn Qudāma, *al-Mughnī*, vol. 9, 340.

Ḥanbal.¹⁰⁶⁶ According to Ibn Qudāma, Ibn Ḥanbal considered marriage of paramount importance to the religion itself, stating that “whoever calls you to not get married is calling you away from Islam” (*man da‘āk ilā ghayr al-tazwīj fa-qad da‘āk ilā ghayr al-Islām*).¹⁰⁶⁷ Ibn Ḥanbal made the marital obligation conditional on the ability to provide for the family, noting that financial incapacity is equivalent to physical incapacity (namely, impotence or *‘ājiz*) when it comes to marriage.¹⁰⁶⁸ For his own part, Ibn Qudāma relates different ways in which to consider marriage. Like other jurists, he considers an individual’s particular circumstance as determinative of how marriage should be categorized. For instance, he makes marriage obligatory for people who genuinely fear that without it they will engage in illicit behavior (*man yukhāf ‘alā nafsihi al-wuqū‘ fi mahẓūr in taraka al-nikāh*). For others, Ibn Qudāma considers marriage only recommended (*mustaḥib*) as a result of lustful feelings (*shahwa*) that might lead to illicit behavior.¹⁰⁶⁹

¹⁰⁶⁶ Ibn Qudāma, *al-Mughnī*, vol. 9, 340. Ibn Qudāma relates that ‘Abd al-‘Azīz and Ibn Ḥanbal consider marriage obligatory both for the purpose of pleasure as well as safeguarding against falling into illicit behavior. Ibn Qudāma, *al-Mughnī*, vol. 9, 341.

¹⁰⁶⁷ Ibn Qudāma, *al-Mughnī*, vol. 9, 341. Apparently, Ibn Ḥanbal said that “if a human being marries then they complete a divine command.” Ibn Qudāma, *al-Mughnī*, vol. 9, 341.

¹⁰⁶⁸ Ibn Qudāma, *al-Mughnī*, vol. 9, 344. Ibn Ḥanbal notes: “it is necessary for a man to get married as long as he has the ability to provide, but if he doesn’t have this ability he should be patient.” Ibn Qudāma, *al-Mughnī*, vol. 9, 344. Ibn Qudāma says that the level of financial capacity does not need to be especially high. Ibn Qudāma, *al-Mughnī*, vol. 9, 344.

¹⁰⁶⁹ Ibn Qudāma, *al-Mughnī*, vol. 9, 341. He says that marriage as a recommended act is the opinion of the *aṣḥāb al-rā’*y and present in the sayings and acts of the Companions. Ibn Qudāma also accounts for situations where someone has no desire (presumably for women) either because they were born without it (specifically, “unsexed” or *‘inīn*) or had desire but it passed with old age, sickness, etc. For this person,

Marriage is again preventative here, but not obligatory because the threat of transgressing remains confined to the point of having evil thoughts as opposed to engaging in an imminent act.

From a *kifāya* standpoint, one of the few jurists to raise marriage as a collective duty is Ibn Taymiyya, who reports that Abū Yaʿlā al-Saghīr and Abū al-Faṭḥ b. Munī speak of marriage as a *kifāya*-duty.¹⁰⁷⁰ Ibn Muflīḥ, a student of Ibn Taymiyya, also reports that Ibn Munī's opinion was not simply that marriage was a *kifāya*-duty, but that "striving for it takes precedence [over other obligations], similar to *jihād*" (*fa kāna al-ishtighāl bihi awlā ka-l-jihād*).¹⁰⁷¹ Ibn Taymiyya actually establishes a hierarchy between different *kifāya*-duties in relation to marriage. He notes that in certain cases of need, marriage may take precedence over an *ʿayn*-obligation like *hajj* due to one's "fear of significant hardship in the absence of marriage" (*khashiyyat al-ʿanat bi-tarkihī*).¹⁰⁷² Where there is no such fear regarding the absence of marriage, then even other *kifāya*-duties, specifically those involving acts of worship (*ʿibādāt*) such as pursuit of knowledge or *jihād*, take precedence

Ibn Qudāma suggests there are two routes: it is recommended they get married or that they abandon marriage completely since there are no benefits in it for them. Ibn Qudāma, *al-Mughnī*, vol. 9, 343.

¹⁰⁷⁰ Ibn Taymiyya, *Al-Fatāwā al-Kubrā*, vol. 5, 450.

¹⁰⁷¹ Ibn Muflīḥ, *Kitāb al-furūʿ*, vol. 8, 178. He also notes elsewhere the opinion of his "shaykh" (which is a reference to Ibn Taymiyya) that marrying "previously unmarried women" (*al-ayāma*) is a *kifāya*. Ibid., 218; see also, Ibn Taymiyya, *Al-Fatāwā al-Kubrā*, vol. 5, 450.

¹⁰⁷² Ibn Taymiyya, *Al-Fatāwā al-Kubrā*, vol. 5, 449-50.

over marriage.¹⁰⁷³

‘Alā’ al-Dīn al-Samarqandī¹⁰⁷⁴ reports that many of his peers consider marriage to be a *kifāya*-duty, but others consider it to be *mandūb* or *mustaḥabb*.¹⁰⁷⁵ Kāsānī suggests that there are various opinions regarding marriage and among these is one that considers it a *kifāya*-duty, where the obligation can be satisfied by the performance of some in the “same way as duties relating to *jihād* or funeral prayers.”¹⁰⁷⁶ Others like, Shīrazī and Majd al-Dīn b. Taymiyya (d. 653/1255) only consider the *walīma* (wedding reception) to be a *kifāya*-duty for the married couple, but not the marriage itself.¹⁰⁷⁷ In other words, there is no duty to marry, but if they choose to do so, then a duty attaches requiring a celebration that functions as a public announcement of the nuptials.¹⁰⁷⁸ For Ibn Rushd, the juristic debate is a linguistic one centering around the nature of the command in Q 4/al-Nisā’: 3 that says to “marry of the women who seem good to you,” as well as use of

¹⁰⁷³ Ibn Taymiyya, *Al-Fatāwā al-Kubrā*, vol. 5, 450.

¹⁰⁷⁴ There is a discrepancy in how the pdf volumes are ordered for *Tuḥfat al-Fuqaha*. It looks like they have been numbered wrong. The chapter on “purification” appears in volume 2 which is highly irregular. Need to look at hard copy.

¹⁰⁷⁵ Samarqandī, *Tuḥfat al-Fuqaha*, vol. 1 (Beirut: Dār al-‘Ilmiyya, 1984), 117.

¹⁰⁷⁶ Kāsānī, *Badā’i’ al-ṣanā’i’*, vol. 2, 228.

¹⁰⁷⁷ Shīrazī, *Tanbīh*, 109; Majd al-Dīn b. Taymiyya, *al-Muḥarrar fī al-fiqh ‘alā madhhab al-imām Aḥmad b. Ḥanbal*, vol. 2, ed. (Riyadh: Maktabat al-Ma‘arif, 1984), 39. Ibn Taymiyya (the grandfather of the arguably more famous Ṭaqī al-Dīn) notes that it is preferable to have the *walīma* within a day or so of the *nikāh*.

¹⁰⁷⁸ For a brief discussion of the issue of public marriages versus secret marriages, see Susan A. Spector, “Some Ḥanbalī Views on Secret Marriage,” in *Arabic Humanities, Islamic Thought: Essays in Honor of Everett K. Rowson*, ed. Joseph Lowry and Shawkat Toorawa (Leiden: Brill, 2017), 35-42.

the imperative verb in the ḥadīth.¹⁰⁷⁹ That said, according to some scholars, at least one type of marriage is universally accepted as being a *kifāya*-duty: marrying widows (*ayāmā*).¹⁰⁸⁰

As noted above, many jurists take a position against marriage being obligatory arguing instead that it is only a permissible act. Ibn Rushd and others argue that the majority (*jumhūr*) opinion of all jurists, regardless of school, is that marriage is only recommended, but not obligated.¹⁰⁸¹ This was a position held by Mālikīs, like Qarāfī, who consider marriage permissible (*mandūb*) depending on the circumstances of the people wishing to get married.¹⁰⁸² He quotes al-Lakhmī's (d. 478/1085) opinion that there are four legal divisions to marriage. First, it is a time-bound duty (*wājib ghayr muwassa'*) for whoever fears that he will engage in fornication, is unable to take a concubine and cannot fast.¹⁰⁸³ Second, marriage is a flexible duty (*wājib muwassa'*), with no time limitation, for

¹⁰⁷⁹ Ibn Rushd, *Bidayat*, vol. 2, 1.

¹⁰⁸⁰ Ibn Taymiyya, *Al-Fatāwā al-Kubrā*, vol. 5, 452. States that “marrying widows is a consensus *kifāya*-duty” (*tazwīj al-ayāmā farḍ kifāya ijma'an*). This opinion arises from an explicit verse in the Qur'ān, 24/al-Nūr: 32, that commands people to “marry single women/widows from amongst yourselves (*wa-ankihū al-ayāmā minkum*).” English translations of the Qur'ān will often translate the term *ayāmā* as “single.” See, *The Qur'ān*, trans. M.A.S. Abdel Haleem (Oxford: Oxford University Press, 2004), 222. However, many Arabic-English dictionaries define it more specifically as “widow.” See, Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cown (Ithaca: Spoken Language Services, Inc., 1979), 37; J.G. Hava, *Arabic-English Dictionary for the Use of Students* (Beirut: Catholic Press, 1899), 17.

¹⁰⁸¹ Ibn Rushd, *Bidayat*, vol. 2, 1. See also, Sarakhsī, *Mabsūṭ*, vol. 4, 193.

¹⁰⁸² Qarāfī, *al-Dhakhīra*, vol. 4, 190.

¹⁰⁸³ Qarāfī, *al-Dhakhīra*, vol. 4, 188-89. Al-Lakhmī is likely a reference to the famous Mālikī jurist Abū 'l-Ḥasan 'Alī b. Muḥammad al-Rabī'ī (d. 478/1085) from Sfax (Tunisia), the author of a lengthy *fiqh*

someone with the same conditions, but able to fast or take a concubine.¹⁰⁸⁴ Third, it is recommended (*mandūb*) as a shield from illicit sex for the person who desires women and already has offspring.¹⁰⁸⁵ Finally, Lakhmī says marriage is the permissible (*mubāḥ*) option for anyone who inclines towards women, but has no offspring.¹⁰⁸⁶ This is in line with Ibn Rushd's view that some later Mālikīs altered the classification of marriage depending on the circumstances and parties involved: for certain people it is obligatory, for others recommended and for everyone else it is simply permissible.¹⁰⁸⁷ Disagreement centers on the interpretation of the linguistic form (*sīgha*), in this case the imperative verbs that occur in the Qur'ān and Prophetic tradition in relation to marriage.¹⁰⁸⁸

Similarly, Shāfi'ī reportedly said that it is “desirable for men and women to marry if they possess the capacity, because God commands it, is pleased by it, and encourages it (*nadaba ilayhi*).”¹⁰⁸⁹ Based on this opinion, Māwardī says that “marriage is permitted

commentary entitled *Kitāb al-tabṣira*. There is some dispute over the date of his death. Carl Brockelmann says it is either 478/1085 or 498/1104. Carl Brockelmann, *History of the Arabic Written Tradition*, vol. 1, trans. Joep Lange (Leiden: Brill, 2016), 417. David Powers a date of 1075 CE. David S. Powers, *Law, Society and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002), 40.

¹⁰⁸⁴ Qarāfī, *al-Dhakhīra*, vol. 4, 188-89.

¹⁰⁸⁵ Qarāfī, *al-Dhakhīra*, vol. 4, 188-89.

¹⁰⁸⁶ Qarāfī, *al-Dhakhīra*, vol. 4, 188-89. Lakhmī also notes that this categorization applies to women, except with regard to their taking on concubines.

¹⁰⁸⁷ Ibn Rushd, *Bidayat*, vol. 2, 1.

¹⁰⁸⁸ Ibn Rushd, *Bidayat*, vol. 2, 1.

¹⁰⁸⁹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31.

(*mubāḥ*), but not obligatory (*laysa bi-wājib*).¹⁰⁹⁰ He addresses Q 4/al-Nisā': 3, which speaks of marrying women that “please you” as proof that marriage is not required because had it been obligatory then one would have to marry whether or not they could find a “pleasing” woman.¹⁰⁹¹ Kāsānī relates the Shāfi'ī position centers on Q 4/al-Nisā': 24, the relevant portion of which states: “other women are lawful to you, so long as you seek them in marriage, with gifts from your property...” (*wa-uḥilla lakum mā warā'a thālikum an tabtaghū bi-amwālikum*). The key portion here is *wa-uḥilla lakum*, which the Shāfi'īs use to argue for treating marriage as a permissible act. Specifically, they note that the prepositional phrase *lakum* (“to/for you”) is ordinarily used to signify allowable acts (*mubāḥāt*). Since marriage is a means of curtailing one's libido (*qadā' al-shahwa*) it becomes a permissible act, similar to “purchasing a female slave” for this purpose.¹⁰⁹² Whereas other jurists might classify controlling one's libido as obligatory, the Shāfi'ī position is that marriage is delivering something of benefit to oneself (i.e. controlling one's libido), but one is not obligated to pursue it. Instead, marriage is a permissible act

¹⁰⁹⁰ Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31. Kāsānī also reports Shāfi'ī's opinion as considering marriage to be “permitted” (*mubāḥ*) like sales of goods. Ibid.

¹⁰⁹¹ Māwardī, *al-Ḥāwī al-kabīr*, vol. 9, 31. The relevant portion of the verse reads: “you may marry whichever [other] women seem good to you, two, three or four.” He also argues that the marriage is to prevent illicit sexual relations, but another option is to fast. If marriage was obligatory then fasting would not be considered a suitable substitute. Ibid.

¹⁰⁹² Kāsānī, *Badā'ī' al-ṣanā'ī'*, vol. 2, 228.

in the same way that eating and drinking are.¹⁰⁹³ Furthermore, the Shāfi'īs argue that another verse in the Qur'ān, Q 3/al-ʿImrān: 39, confirms this view regarding marriage. The verse praises John the Baptist as being a prophet who was noble and “chaste” (*ḥaṣūr*); if marriage were obligatory then abstaining from women would not be praiseworthy, but rather blameworthy.¹⁰⁹⁴

As the above discussion of marriage indicates, there is no clear argument as to why it should be included within the subset of *kifāya*-duties to rescue. In large part, this is due to the fact that jurists themselves were not sure whether marriage should be classified as an obligation or not. For those who do not classify it as an obligation, the connection to a duty to rescue is not present. Likewise, the Zāhirīs seem to consider marriage an *ʿayn*-obligation, which also falls outside the *kifāya*-duties to rescue. Furthermore, the Zāhirī discussion centers on linguistic justification for how an imperative command should be understood or how a legal maxim functions in relation to the marital obligation. Their discussion does not center on the moral and ethical speculation behind duties to rescue.

¹⁰⁹³ Kāsānī, *Badāʿiʿ al-ṣanāʿiʿ*, vol. 2, 228.

¹⁰⁹⁴ Kāsānī, *Badāʿiʿ al-ṣanāʿiʿ*, vol. 2, 228. Kāsānī contends that this verse actually demonstrates an *ʿayn* of the *sharʿa* applicable to John the Baptist; he argues the legal prescription regarding marriage is different. *Ibid.*, 229.

With regard to the remaining juristic discussion on marriage, a connection can be made with duties to rescue based on a similar rationale requiring performance of the duty due to urgency. Of course, unlike other duties to rescue, marriage and whether it occurs or not has a pragmatic component for any society for a number of reasons. However, jurists who consider marriage a *kifāya*-duty center its necessity on it being a “defense against illicit sexual relations.” In other words, marriage is required for those people who need to be rescued from their own desires. Jurists like Ibn Taymiyya give precedence to marriage over even *‘ayn*-obligations where an individual experiences severe hardship from remaining celibate. Likewise, Qarāfi’s division of marriage shifts classification of the act as an obligation depending on the urgency of the circumstances. Marriage is an obligation for someone who cannot control their desires, but is only recommended for others who don’t have the same issue. In addition, it should be noted that the “rescue” component is more explicit where there is greater vulnerability, as in the case of marrying widows, and jurists are largely in agreement as to the presence of a *kifāya*-duty in these situations. However, the vital difference between other duties to rescue and marriage is the severity of the consequences. In those other duties death is imminent whereas for marriage only illicit sexual relations may be imminent.

Concluding Thoughts

This chapter describes a unique subcategory of duties within the larger *kifāya* category: duties to rescue. Ideally, one would want to understand the extent to which these duties developed out of social and political factors arising in each jurist's environment. Central questions to ask would be whether the introduction of new communities into the larger Muslim community led to the need for greater social cohesion or the encouragement of certain behaviors so that a more seamless communal ethic could be established. Unfortunately, such a study requires social history sources for each jurists' context that are not currently available.

Fortunately, there is still much to be learned from these duties, which produce a discourse of moral and ethical speculation among jurists that demonstrate their thinking on the law beyond the pragmatics of its implementation. Their inquiries turned on the question of moral responsibility, or more specifically, whether there is a moral duty to aid? Jurists delved into investigating the proposition, as stated by the moral philosopher Peter Singer, that "if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought,

morally, to do it."¹⁰⁹⁵ Additionally, if there is a moral duty to the helpless, what extent of self-sacrifice and self-endangerment is necessary to satisfy the duty? While these questions carry no pressing social need, they test the limits of the jurists' moral imagination and in the process shape the contours of Islamic law. Jurists do this by assessing the impact of concepts like immediacy, proximity and capability on an individual's moral responsibility.

Furthermore, duties to rescue also represent a departure from the notion that jurists approached the law solely as legal realists, not positivists; on the contrary, principles, as opposed to social circumstances, created legal rules for rescue. In fact, the jurists exploring these particular *kifāya*-duties seem unimpeded by constraints from even foundational texts. The duties are intuitive, reflecting common sense notions of moral responsibility. Of course, this is not to suggest that jurists were either exclusively positivist or realist, but rather to note that they were comfortable occupying both spaces at the same time. The dichotomy between these approaches did not hinder the jurists

¹⁰⁹⁵ Peter Singer, "Morality," 231. Interestingly enough, he limits this to the requirement "only to prevent what is bad, and not to promote what is good." Singer, 231. This distinction cuts against Islamic law's moral prescription, based on various Qur'ānic verses, to command right and forbid wrong. *See generally*, Cook, *Commanding Right*. In some respects, Islamic law's requirement to promote good can be seen as an extension of the duty to rescue since part of the motivation behind the "commanding right" is to rescue people from evil.

from employing them interchangeably depending on the type of duty they were exploring. They want the law to be dynamic, even as they insist it must maintain some static formalism for the sake of structure. They appear unencumbered by inconsistency as long as the loftier objectives underpinning the law are achieved. At its core, they are asking where to “draw the line between conduct that is required and conduct that is good although not required, so as to get the best possible result?”¹⁰⁹⁶

¹⁰⁹⁶ Peter Singer, “Morality,” 240.

CONCLUSION

Years ago, as an undergraduate student, I was invited to observe an intimate scholarly gathering of Islamic studies professors at a leading American university. The format was simple: a scholar would present their paper and another would respond. During the course of this day-long workshop, one particular exchange left a lasting impression. After an especially erudite paper had been presented on an aspect of premodern Islamic thought, the respondent recounted the key points in a lengthy comment before concluding with a poignant question: “so what?” The present treatise began with a question about its origin story—why *farḍ kifāya*—and now takes up a version of the “so what” question by asking: what are we to make of the preceding discussion? Phrased another way, what precisely is its value?

Of course, on its face, one might conclude that there is value simply in the fact that an extensive examination of this key legal concept now exists for the first time in a Western language and this adds another piece in our quest to better understand the Islamic legal tradition. In some respects, that might be enough to satisfy the “so what” question. However, I suspect the respondent at that workshop would remain unsatisfied by this. Instead, they would likely want to know how precisely our understanding of Islamic law is enhanced: what lessons have been learned and why might they matter?

Before exploring these lessons, it seems appropriate to further acknowledge the basic value of the present work. This study has endeavored to shed light on the jurists' creation of a scheme of obligations that cover significant aspects of Muslim life. The suggestion that there may be such a thing as a *kifāya* doctrine is a novel one, but plainly evident from the primary sources. While topics like *jihād* and funeral rites are routinely discussed they are seldom approached from the perspective of obligation as opposed to simply black letter law. The shift in perspective advocated here moves from exploring these topics as independent rules to viewing them as duties within a larger framework of obligation. This shift offers many new dimensions to further our understanding of what jurists were seeking and the constraints they felt. To some degree, we now have a better sense of the normative universe within which jurists were creating legal rules in the premodern period.

Beyond this, there are also four important themes that emerge in the *kifāya* discussion which provide potential insights into the enterprise of Islamic law as a whole. In some respects, these themes can be said to emerge in an overarching context that underlies juristic thought: Islamic law is at once the law of empire, community and personal devotion. The content of treatises of substantive law bear witness to this, moving between topics that at times fall strictly within the purview of one of these three

areas and at other points traverse all three at once. This overlapping is especially noticeable within the category of *kifāya*-duties and is a subtext to the themes that emerge in juristic thinking on these obligations.

The first theme is a persistent oscillation between functional and pietistic rationales that jurists rely on to create rules surrounding these duties. Jurists indicate a commitment to neither a purely realist or positivist approach to the law. Instead, they recognize the law as multi-dimensional, serving multiple purposes at once. For example, in the context of funerary duties, jurists describe the method for performing the ritual washing as serving the practical goal of “cleansing” the corpse before burial. Likewise, the practical limitations of the battlefield impact the rules jurists create for how to bury fallen soldiers. In their functional analysis, jurists rely on and develop roles for concepts like proximity and immediacy as important determinants of legal rules governing *kifāya*-duties. Thus, in the context of *jihād*, the scenarios in which the duty is triggered include instances when the physical proximity between a potential performer and the battlefield is decreased or when the enemy comes within proximity to the Muslim population.

At the same time, there is also a pietistic analysis that occurs, which at times supplements functional considerations. The best example of this might be the situation of martyrs. They receive fewer funerary duties given the difficulties associated with

conferring these rites in the midst of battle or shortly thereafter. However, jurists recognize the need for these martyrs to be elevated as acknowledgement of their sacrifice. As a result, the rationale that emerges to justify the absence of funerary duties for martyrs revolves around a narrative of their blood's sacredness.

Similarly, at times jurists forgo practical considerations and simply engage in moral and ethical speculation as they define a duty. The best example of this is the duty to rescue, especially the easy rescue, which has little practical utility given how rarely the average person finds themselves in the position to rescue anyone. Hence, unlike funerary duties or *jihād*, where the frequency of their occurrence shapes the rules jurists develop, duties to rescue depend on the jurist's moral imagination. The inquiries jurists make about duties to rescue have broader ethical implications, fundamentally asking what level of sacrifice must one person endure on behalf of another.

Functionalism or pragmatism is also an important part of the story of Islamic law for another reason. The jurists' pragmatic interventions are routinely given sacred status, based on dubitable links to the sacred sources, and this enlarges religious law while complicating the law's theoretical consistency. Jurists wrestle with, on the one hand, serving the needs of the people by crafting law that addresses their lived experience while, on the other hand, preserving the internal coherence of the law. These

interests conflict just as frequently as they coincide. To serve the people, jurists pursue rules based on practical necessity and approach the law with a functionalist lens in order for its continued applicability and relevance in people's lives. It is no small consequence that this also allows jurists themselves to remain relevant and influential. At the same time, they are keen on serving the law and do so through attempting to maintain consistency within the framework.¹⁰⁹⁷

However, this last point proves hard to pursue in light of jurists' pragmatic sensibilities. Hence, at least for *kifāya*-duties, they settle for a more modest goal: symmetry within the law. This is the second theme that arises in the preceding chapters. Symmetry is different than consistency because it is narrowly focused on particular legal rules as opposed to a more expansive view across the law. For *kifāya*-duties, consistency across the law is a harder proposition given the lack of an overarching rationale that ties the duties together. There is no mechanism to consistently determine which acts qualify as *kifāya*-duties and which do not because the same rationale that includes one act within

¹⁰⁹⁷ As Norman Calder notes, one of the ways in which the “generative, progressive aspect of the law worked” was by “logical generation of new rules which were consistent with the established core and the established patterns of justificatory argument.” Calder, *Islamic Jurisprudence*, 61. Ahmed El-Shamsy states that the “pursuit of consistency through analogical extensions was...a characteristic of the *raʾy* method of dialectic debate.” El Shamsy, *Canonization*, 193. This method searched for “common assumptions” to allow for a “shared basis for reasoning” that then let them focus on the “ramifications and applicability” of the shared assumptions. El Shamsy, *Canonization*, 26.

the category may not be enough to include another. The inability to predict new *kifāya*-duties presents a challenge for the broad pursuit of consistency. Symmetry in discrete areas of the law at least allows for some internal coherence that fortifies the law's structure.

An example of this symmetry is what jurists seek between life and death, particularly in funerary duties. As Kāsānī notes, “the situation at death should be considered in light of the same context in life” (*ḥālat al-mawt mu‘tabaratun bi-ḥālat al-ḥayāt*).¹⁰⁹⁸ For instance, in developing rules for funeral prayer and ritual washing at death jurists analogize to prayer and its preconditions in life. In theory, there is no practical need to do so; they could just as easily develop rules for funerary duties that are disassociated from requirements for the living. But, jurists go to great lengths to create symmetry between life and death. This symmetry projects a level of theoretical consistency, but is piecemeal not holistic. This may suggest insights into the way in which Islamic law has developed, but may also be a broad commentary on the inevitable inconsistency that will emerge in any legal system faced with the limits of law and the demands of the people governed by it.¹⁰⁹⁹

¹⁰⁹⁸ Kāsānī, *Badā’i‘ al-ṣanā’i‘*, vol. 1, 302.

¹⁰⁹⁹ Arguably one of the few to pursue consistency across the law, in theory and method, was Ibn Ḥazm and it eventually proved untenable.

A third theme that emerges in the discussion on *kifāya*-duties is the role of the state or more specifically that of state authority within the law. As noted early in this treatise, the state is a contentious topic within the field of Islamic studies and scholars have generally coalesced around the idea of its diminished role within Islamic law. While it is certainly true that Islamic law does not necessarily imagine a robust, centralized modern administrative state as an instrumental part of its legal system, that is not the only conception of a state that can exist. A looser, decentralized state consisting of a center with many autonomous parts is also a model of political governance that exerts some authority over the law. Furthermore, and especially pertinent for our purposes, while it can be argued that in practice the central state or caliphate after the reign of Ḥarūn al-Rashid continued to diminish, in the jurist's imagination and writing it maintained a prominent role. The *imām* remains a key figure and continues to be present in later juristic discourse even after the introduction of the parallel authority of the *amīr*.

Kifāya-duties are a prime example of this continued role, somewhat regulatory, that jurists imagined for state authority in the law. Most prominently in the context of *jihād*, the idea of a “competent authority” is central for the administration of the duty. Jurists do not conceive of the *jihād*-duty functioning without the permission of the state except in exigent circumstances that might require it. Political authority defines the

parameters of warfare, who engages in battle and when the duty to fight is suspended. This is not to say that jurists were unaware of the challenge that comes with allowing the state to exert authority over a duty that also manifests the ultimate sign of personal devotion. Their rules around the duty reflect this concern and carve out space for the *jihād*-duty to function independently of the state as well if required. Political authority even arises in the context of funerary duties where jurists require the state to spend from the public treasury for the burial of indigent members of society. Likewise, in the context of foundlings, the state not only has to provide for the caretaking of the child, but in certain circumstances is required to actually perform the duty by having the child become a ward of the state.

The final theme that emerges in this juristic discourse is that of the moral community, one defined by obligations that its members owe to each other. A significant portion of the discussion on *kifāya*-duties takes up the question as to who is owed these duties and who is required to satisfy them. Both the performance of the duty and having it performed on you is conceived of as a privilege of membership as opposed to a burden. In part, there is clearly an intention by jurists to define the moral community such that religious identity supersedes virtually all other identities a person might have. Arguably, the most powerful of these other identities arises out of kinship and with funerary duties

this factors into the discussion on who has the privilege of performing the rites that are owed to the deceased. Similarly, in the context of *jihād*, the label of martyr, and its associated privileges, is generally conditioned on death coming at the hands of hostile forces *outside* the moral community.

Yet, even this idea of a moral community defined by religious identity is disrupted at different points, especially in the context of duties to rescue. In this context, the moral community expands and the obligations that are owed to members of the community are extended to humanity as a whole. The most pertinent example of this is the situation of easy rescue, where someone is drowning and requires saving. Jurists never pose the question of the drowning individual's faith as a condition to their rescue. Their humanity is enough to trigger a duty. Likewise, in the context of foundlings, the default assumption jurists have is that the abandoned child is free and not a slave. This is premised on their stated belief that all human beings are born free and the child's default status is not altered even when their presumed religion is not Islam.

What do these obligations and the accompanying themes mean for the study of Islamic law? They suggest that jurists who craft Islamic law are pragmatic, but not constrained by functional considerations alone. They endeavor to find symmetry in the law when possible in order to lend it some internal coherence. They recognize the role

of state in the administration of Islamic law, but it does not permeate every aspect of the law. The law services the needs of empire, community and individual sometimes concurrently and at other times separately. Finally, in every duty that jurists define as *kifāya* they etch out the contours of the moral community, one that carves out a space for religious identity without abandoning the obligations that are owed to humanity at large. Above all else, the discourse in the preceding pages suggests the centrality of obligation in the normative universe of Islamic law and how it defines itself. In my estimation, all this is indispensable to the study of the Islamic legal tradition.

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